INALIENABILITY AND THE THEORY OF PROPERTY RIGHTS

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Inalienability is the stepchild of law and economics. Too often, economists note the existence of restrictions on transferability, ownership, and use, only to dismiss them as obviously inefficient constraints on market trades. Even Guido Calabresi and Douglas Melamed, who give inalienability explicit status in their theory of entitlements, treat it as an analytic stepchild to be justified by appeals to paternalism and moralism.[1]

On inspection, however, inalienability turns out to be a very complex concept, and one whose legitimate uses can be clarified through economic analysis combined with a sensitivity to noneconomic ideas—most notably ideals of citizenship and distributive justice. Inalienability can be defined as any restriction on the transferability, ownership, or use of an entitlement. So defined, inalienability is pervasive in modern, developed societies, in developing nations, and in the historical past. The variety and ubiquity of these restrictions suggest that a fuller analysis would help us better understand the role of private property in economic and social life. This Article begins such an analysis by first categorizing the possible types of restrictions, and then developing rationales that may justify some of these constraints on private ownership.

To do this, we must take a broader view of the role of legal entitlements than is expressed in most work on property rights in law and economics. Much of the existing literature emphasizes the way that efficient entitlement rules are affected by the technical characteristics of products and the costs of externality control.[2] Fish, pasture land, for-

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1. Calabresi & Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972).

2. For many of the basic articles, see Economic Foundations of Property Law (B. Ackerman ed. 1975); The Economics of Legal Relationships: Readings in the Theory of Property Rights (H. Manne ed. 1975); see also Demsetz, Toward a Theory of Property Rights, 57 Am. Econ. Rev. (Papers and Proceedings) 347 (1967) (reviewing literature); Furubotn & Pejovich, Property Rights and Economic Theory: A Survey of Recent Liter-

ests, oil pools, and minerals on the ocean bottom are only a few of the resources that have been subject to a property rights analysis.[3] The research focuses rather narrowly on the efficiencies of private ownership systems that require people to take account of all the costs of resource use. Most of this work, moreover, has been excessively confident in the workings of the private market once property rights are firmly established and therefore views restraints on alienation with a great deal of skepticism.[4]

In contrast, Calabresi and Melamed believe that inalienability rules can sometimes be justified, but they do not attempt a full analysis of the rationales for restrictions on transferability, ownership, and use.[5] Their work emphasizes instead the distinction between property rules and liability rules. Under a property rule, property can be sold, donated, or discarded, but only if the owner is willing to give up the entitlement and the recipient is willing to accept it. Under a liability rule, others may take your entitlement by, for example, destroying it in an accident, but they must then compensate you at a rate determined by a governmental body. Because Calabresi and Melamed's treatment of inalienability is colored by this emphasis on quid pro quo transfers, they discuss only one kind of inalienability—where ownership is legal but sales are not permitted—and they fail to discuss the economic rationales for even this form of restriction.

In the present paper I propose a broader based approach that seeks both to identify the range of possible restrictions and to develop normative rationales for some of these restrictions. Because my basic point of view is informed by economic theory, I start with the supposition that unencumbered market trades are desirable unless we can locate a valid reason for their restriction. I reject the idea that market trades are inherently coercive. Nevertheless, some forms of inalienability do have valid public policy justifications in a democratic market society. Three broad rationales are central to my argument. First, economic efficiency itself may require restrictions on property. This rationale goes beyond the familiar problems of externality control to include imperfect information, "prisoner's dilemmas," free rider problems, and the cost of administering alternative policies. Second,

ature, 10 J. Econ. Literature 1137 (1972) (reviewing literature); North, Structure and Performance: The Task of Economic History, 16 J. Econ. Literature 963 (1978) (reviewing literature).

3. See, e.g., Anderson & Hill, The Evolution of Property Rights: A Study of the American West, 18 J. L. & Econ. 163 (1975); Gordon, The Economic Theory of a Common-Property Resource: The Fishery, 62 J. Pol. Econ. 124 (1954); Hardin, The Tragedy of the Commons, 162 Sci. 1243 (1968); Sweeney, Tollison & Willett, Market Failure, The Common-Pool Problem, and Ocean Resource Exploitation, 17 J.L. & Econ. 179 (1974).

4. See, e.g., Bureaucracy vs. Environment: The Environmental Costs of Bureaucratic Governance (J. Baden & R. Stroup eds. 1981).

5. See Calabresi & Melamed, supra note 1, at 1111–15.

certain specialized distributive goals can only be achieved through some kind of inalienability rule. A general program of taxes and transfers may be inadequate. Third, unfettered market processes may be incompatible with the responsible functioning of a democratic state.

I begin in Part I by classifying entitlement rules by ownership, use, and transferability. My framework is less complex than the heterogeneity of the legal world, but more complex than previous attempts, such as Calabresi and Melamed's. I draw examples both from current controversies—including the sale of blood, military conscription, the preservation of historic buildings, and the protection of endangered species—and from such historical examples as the Homesteading Acts and the Civil War draft. My hope is that the taxonomy I propose will help scholars recognize similarities and salient differences between the broad diversity of entitlement restrictions currently in force. My framework should not be read, however, as an attempt to justify the entire range of existing constraints on property rights. Many of these have their roots in paternalistic attempts to impose moral values on others or in efforts by interest groups to obtain monopoly power.

In Part II, I develop efficiency and equity rationales for some existing restrictions and point out the analytic similarities between such disparate things as blood and used cars, or babies and lake trout. I demonstrate that inalienability rules can be second-best responses to various kinds of market failures and point out both how some restrictions on property rights serve redistributive goals and how other restrictions may impose unfair costs. Finally, I show in Part III how each of four distinct concepts of citizenship resolves the tension between efficiency and egalitarian values.

I. A Taxonomy of Entitlements

In examining the rationales for legal restrictions on entitlements, one must avoid being overwhelmed by the multitude of individual cases. To keep the analysis manageable, therefore, I will concentrate, in turn, on each of three dimensions of the problem: (1) *who* may hold the entitlement; (2) what *actions* the entitlement holder is required to perform to maintain title, and what actions are forbidden; and (3) what kinds of *transfers* are permitted. After outlining the important possibilities, I select a few of the most representative and interesting cases to discuss in more detail in the body of the paper.

A. *Restrictions on Ownership, Use and Transferability*

I begin first with the question of who may hold the entitlement. Legal rules may permit: (a) anyone, (b) only some specified groups, (c) everyone simultaneously, or (d) no one, to hold title. Cases (c) and (d) cover goods that cannot be privately owned, either because the state has declared them common property, so that exclusion of others is forbidden (navigable waters), or because they are illegal (heroin, liquor

under Prohibition). In case (b), the state determines who may hold the entitlement. The class of qualified owners may include only those with some demographic characteristic such as old age or female sex, or it may be limited on the basis of some selection procedure such as an examination or a lottery.

Second, entitlement holders may face restrictions on the use of their property that are designed to produce some benefit or prevent some undesirable activity. We must distinguish between activities that are permitted, required, or forbidden. Since required activities are a subset of all permitted activities, the possible legal relationships between these distinctions are as follows:

TABLE 1
RESTRICTIONS ON USE

	Nothing is Required	All Permitted Activities are Also Required	Some Permitted Activities are Also Required
Nothing is Permitted	1	—	—
Nothing is Forbidden	2	—	3
Some Activities are Permitted and Others are Forbidden	4	5	6

Case (1) is one extreme: nothing can be done with the entitlement. In fact, in such a situation it seems odd to speak of entitlements at all. Case (2) is the opposite extreme: everything is permitted and nothing is required.[6] Case (3) is somewhat more restrictive: everything is permitted so long as some required activities are carried out (e.g., a historic building preservation law). Under (4), some activities are forbidden but nothing is required (e.g., a zoning law). In (5), those who wish to retain title are required to perform certain activities, which are also the only activities permitted (e.g., a homestead law). In (6), a proper subset of the permitted activities is also required while other activities are forbidden (e.g., a zoning law in a community that also regulates historic buildings).

Third, consider the transferability and disposal of entitlements. Since regulation of the external costs imposed by the free disposal of

6. It would be logically possible to consider the middle box in Table 1 but not very realistic. Under such a rule, everything that can possibly be done with an entitlement is legally required.

waste has been relatively well analyzed by others,[7] I shall not emphasize it here. Instead, I concentrate on the difference between sales and gifts. Table 2 summarizes the four possibilities:

TABLE 2
RESTRICTIONS ON TRANSFERABILITY

	Gifts Permitted	Gifts Forbidden
Sales Permitted	pure property A	modified property B
Sales Forbidden	modified inalienability C	pure inalienability D

Under case (A), a pure property rule, all voluntary transfers are permitted. Under case (B), a modified property rule, only sales, generally at market prices, are permitted. Case (C) is called modified inalienability because sales are outlawed while gifts are permitted. Case (D) represents pure inalienability.

B. *A Synthesis*

Putting together the three dimensions along which entitlements can vary yields almost one hundred cases. Since this Article deals with the control of private property, however, I will consider neither goods that cannot be used or legally possessed nor pure public goods. Of the forty cases that remain, the nine I examine can be divided into two general categories: those that affect the allocation and use of market goods and services and those that reflect alternative concepts of citizenship.

Within the market goods and services category, I begin by considering two cases that restrict transferability. Under the concept of *modified inalienability*, sales are forbidden, but gifts are permitted and may even be encouraged by state policy. Modified inalienability rules appear in such diverse contexts as the transplantation of body parts, the adoption of babies, and the preservation of endangered species. The converse of a modified inalienability rule is *modified property*. Under this rule, gifts are forbidden but sales at "fair" market prices are permitted. This rule generally does not apply to particular kinds of property but rather to particular situations. For example, an insolvent person or firm cannot give away valuable assets.

Three other cases involve limits on ownership and use. Thus, *pure property with ownership restrictions* limits the entitlement holders to individuals with particular attributes. They must be, for example, licensed physicians, persons who are over eighteen or over sixty-five, residents of Guilford, Connecticut, or persons approved by the board of directors. Transferability and use, however, are not restricted: the entitle-

7. See, e.g., Calabresi & Melamed, supra note 1.

ment can be sold or given to anyone else who also qualifies for ownership, and can be used without coercive conditions. Two simple cases involve restrictions on use: under *required use*, nothing is forbidden, but some uses are required, while under *limited use*, nothing is required, but some things are forbidden. Thus historical preservation laws require the preservation of certain buildings while zoning laws may forbid apartment buildings or commercial development on some pieces of land.

Finally, under systems of coerced use, all permitted activities are required and all other uses are forbidden. When such requirements are imposed on property owners, it is important to know whether the right is transferable or whether severe restrictions are imposed on an owner's right to dispose of his property. Under the former, called *pure property with coercive use*, a mineral lease, for example, may be sold or given away but will be lost if no mining is carried out. Under the latter rule, which I label *conditional coercion*, requirements are imposed on qualified entitlement holders, but people may waive these reponsibilities if they are willing to waive the entitlement as well. This kind of rule is more complex and restrictive than one that permits sales. The American homesteading laws, for example, gave land to families on the condition that they farm it for a fixed number of years. In a quite different context, many of today's government transfer programs for the needy are conditionally coercive.

Restraints on alienation are also imposed when people perform their responsibilities as citizens. Thus, the final group of categories embodies alternative concepts of citizenship. The categories are alienable rights—analogous to pure property rules with limits on ownership—inalienable rights, alienable duties—equivalent to coerced use—and inalienable duties. These concepts can be understood by considering their different implications for voting rights, military service, and jury duty. *Alienable rights* can be sold or transferred to others and need not be exercised to be retained. Under this concept, the state has a volunteer army and permits the sale or donation of votes. *Inalienable rights* also need not be exercised, but the right cannot be sold or given away and some uses may be forbidden. Once a person is found qualified, however, there are no actions that must be taken in order to maintain the right. In the United States voting is an inalienable right, and some government social benefits also fall in this category. *Alienable duties* are activities required of a subset of the population that can be transferred to other persons willing to perform them. For example, during the Civil War, persons drafted into the army were permitted to buy substitutes. Finally, *inalienable duties* cannot legally be transferred through sales, gifts, or disposal. A military draft with no buy-out possibilities and jury duty are familiar examples.

To help keep these categories in mind as I proceed, Table 3 lists each type to be considered along with some important examples. The

numbers and upper case letters in parentheses refer to the labels in Tables 1 and 2, respectively, and the lower case letters refer to alternative restrictions on ownership.

TABLE 3

Entitlement Categories	Examples
1) Inalienable Duties (5.D.b.)	Army draft notices; jury duty; votes in Australia
2) Inalienable Rights (4.D.b.)	Votes in political contests in the United States
3) Conditional Coercion (5.C.b.)	Homesteads; benefits under some government transfer programs
4) Modified Inalienability (2.C.a.)	Kidneys; hearts; wild game; babies
5) Modified Property (2.B.a.)	Prohibitions against gifts prior to declaration of bankruptcy
6) Pure property with ownership restrictions (alienable rights) (2.A.b.)	Liquor; taxis in New York City; volunteer army
7) Pure property with required use (3.A.a.)	Historical preservation laws
8) Pure property with limited use (4.A.a.)	Automobiles; land use zoning
9) Pure property with coercive use (alienable duties) (5.A.a.)	Natural resource rights that must be used or lost; army draft in the United States Civil War

II. EFFICIENCY AND EQUITY RATIONALES

A. *Overview of the Argument*

The objectives of this Article are primarily normative. I do not attempt to explain why any particular legal restriction was enacted into law. Instead, I ask whether plausible justifications can be given for some frequently observed legal patterns. This Part concentrates on three broad normative claims. First, the existence of transaction costs will frequently make a simple system of property-liability rules inefficient,[8] so that more restrictive regulations such as inalienability rules may have merit. Second, distributive goals cannot always be achieved by simple lump sum transfers but may require more intrusive policies. Third, even when inalienability rules are justified on efficiency grounds,

8. See Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960) (arguing that in the absence of transaction costs any clear cut allocation of property rights will be efficient); see also Cooter, The Cost of Coase, 11 J. Legal Stud. 1 (1982) (exploring the implications of the proposition).

compensation may be required to avoid imposing concentrated costs on particular individuals or groups.

The efficiency rationales for inalienability rules are second-best responses to market failures that arise because of externalities, imperfections in information, or difficulties of coordination. The straightforward responses of internalizing the externality through fees or taxes, of subsidizing the provision of information, and of facilitating joint action may, for one reason or another, be costly. In such cases, the alternative of restricting market trades becomes a realistic possibility. Instead of correcting the market failure through policies that rely on price incentives and market processes, inalienability rules address the difficulty with a set of prohibited or required actions that make market incentives less, rather than more, important. I consider each of the three types of market failure in turn.

Externalities figure prominently in discussions of market failure and provide the most commonly recognized rationale for inalienability rules. Production and consumption externalities occur when the profits of firms or the satisfaction levels of individuals are affected by transactions in which they are not directly involved. These third parties would be willing to pay to obtain the benefits or to avoid the harms imposed on them, but because they are not part of the transaction, benefits are too low and costs are too high. For example, in the absence of regulation, a factory may create water pollution as part of its production process because it need not account for the harm caused by pollution. Economists generally seek to control externalities by creating market-like incentives through tax and subsidy schemes that encourage firms and individuals to respond to marginal shifts in costs and benefits.[9] Economic analysts have also recognized that other alternatives that involve the definition or rearrangement of property rights may be equally satisfactory. Thus, externality problems may be solved by "internalizing" them or by providing "separate facilities" solutions. Under the former, a single individual is given title to both the property causing the externality and the property affected by it. So long as this does not create monopoly power, the new owner will have an incentive to behave efficiently.[10] Under the latter, property relations are rearranged so that externality producers are separated from those who would suffer from the externality.[11]

Unfortunately, optimality may be difficult to achieve in a world

9. Any standard text in microeconomics or public finance discusses the public pricing of externalities. See, e.g., R. Musgrave & P. Musgrave, Public Finance in Theory and Practice 692–715 (2d ed. 1976). For applications to environmental pollution, see Economics of the Environment (R. Dorfman & N. Dorfman 2d ed. 1977); A. Freeman, R. Haveman & A. Kneese, The Economics of Environmental Policy (1973).

10. See, e.g., Sweeney, Tollison & Willett, supra note 3, at 186–88 (analyzing oil pools).

11. See E. Mishan, The Costs of Economic Growth 80–99 (1967).

with high transaction costs. Even a tort law system that places liability on the person who can most efficiently reduce the harm[12] may not be effective in all situations, and taxes and subsidies may be difficult to implement because of political opposition or inadequate information.[13] In the second-best world faced by regulators, there will be room for direct regulation of behavior. For example, suppose there is a strong statistical relationship between some characteristic of the user of a product and an external cost. Ex post, however, causation may be difficult to establish in particular cases. Moreover, even if causation can be established, the individuals may not be wealthy enough to pay the claims against them. If a large portion of the class of individuals is involved, then the most effective way of reducing external costs may be to prevent the entire group (e.g., blind people and children) from using the product (e.g., driving an automobile). Similarly, other types of externalities can be prevented by regulating the use of a product. Speed limits and traffic signals control driving over and above tort law rules that penalize negligent behavior.

Markets also frequently work poorly because information is imperfect and asymmetrical. This kind of market failure provides a second, and less widely recognized, rationale for inalienability rules in particular contexts. First, consider information asymmetries. If buyers are unaware of product defects, then high quality sellers cannot command higher prices than low quality sellers, and there may be a general deterioration in quality. A second information problem arises when two products look alike but one can be legally possessed while the other cannot. For example, laws protecting rare birds prohibit the taking of specimens after a set date but permit possession of those killed in the past. We can then expect suppliers fraudulently to claim that their illegal products actually fall into the legal category. Buyers are not harmed by this misrepresentation but some other policy is undermined. A modified inalienability rule—permitting gifts but not sales—may resolve both of these problems.[14]

Finally, difficulties of coordination may cause resources to be allocated inefficiently. This problem is closely related to the more pervasive problem of externalities, but because it has several distinctive features, I consider it as a separate category. The coordination problem arises most clearly in the case of pure public goods—urban parkland, for example—consumed in common by a large group. No one has an incentive to provide the efficient amount of this good because

12. See G. Calabresi, The Costs of Accidents (1970) (recommending that liability be placed on the cheapest cost avoider).

13. For a discussion of some of the problems with pricing policies, see Rose-Ackerman, Effluent Charges: A Critique, 6 Can. J. Econ. 512 (1973); Rose-Ackerman, Market Models for Water Pollution Control: Their Strengths and Weaknesses, 25 Pub. Pol. 383 (1977).

14. See infra notes 25–29 and accompanying text.

the supplier bears all the costs and receives only a fraction of the benefits. Outlawing sales but permitting gifts is one way to achieve conservation while retaining considerable freedom for private action.[15] Closely analogous to this case is the "prisoner's dilemma": all would benefit from coordinated action, but in the absence of coercion, independent action is inefficient. Consider, for example, the problem of coordinating the development of a new geographical region. Everyone is better off if other people have settled first, but no one has an incentive to be the first settler. To alleviate this problem, policymakers may attach coercive conditions such as a requirement that owners actually live on and develop the land in order to perfect their title.[16]

More narrowly focused coordination problems arise in controlling the opportunistic behavior of a person who purports to act on behalf of another. An inalienability rule may mitigate these problems when the law that directly controls the parties' relationship is inadequate. The law protects creditors, for instance, by preventing a person close to bankruptcy from giving away assets. Similarly, mineral leases that require payment of royalties equal to a percentage of the mining profits may include diligence requirements to induce leaseholders to search for resources.

The imposition of restrictions on alienability will, of course, generally have distributive as well as efficiency consequences. While analysts primarily concerned with efficiency may view a policy's redistributive impact as an unwelcome side effect, sometimes the distributive effects of a rule will be its primary justification. Because restrictions on transferability, ownership, and use single out a particular type of good or service for special treatment, these restrictions usually cannot be justified on broad redistributive grounds. Rather, the distributive case for inalienability is more narrowly focused. If policymakers wish to benefit a particular sort of person but cannot easily identify these people ex ante, they may be able to impose restrictions on the entitlement that are less onerous for the worthy group than for others who are nominally eligible. For example, the coercive conditions imposed on the use of land under the Homesteading Acts can be justified as a means of ensuring that the resource was transferred only to worthy recipients—in this case, formerly landless people willing to live on and farm the property for several years.[17]

Restraints on alienation also may have redistributive effects incidental to the primary justification for the policy. Restrictions justified on efficiency grounds frequently impose costs on a small or concentrated group, such as owners of land that has been down-zoned or owners of distilling equipment under Prohibition. Therefore, policymakers

15. See infra notes 21–24 and accompanying text.

16. See infra notes 73–77 and accompanying text.

17. See infra notes 81–82 and accompanying text.

must decide whether to compensate these losers. In some cases, the appropriate response to redistributive effects will be straightforward. Where policymakers believe that the affected group deserves to bear the costs of the policy, there should be no compensation. The group might, for example, be composed of people earning monopoly profits. Although economic discussions of monopoly power commonly stress the inefficiencies of markets with a single seller, a basic distributive principle generally seems to lurk behind these analyses. The principle is this: except as a reward for risk-taking, no one is entitled to profits that exceed the competitive rate of return because of market imperfections. Economic rents or earnings above this level can be confiscated by the state for redistribution to others.[18] Compensation is also not justified if the owners accepted the risk of the restriction at the time of purchase. This expectation will have been reflected in the original purchase price, and it would be redundant to compensate the owners further.[19] Conversely, compensation will be appropriate where there is no principled reason for the group to bear the costs of the policy and where doing so would not undermine the effectiveness of the restriction. For example, compensating owners of historic buildings for the costs of maintaining the structure's historical value would spread these costs among taxpayers without defeating the purpose of the restriction on use.[20]

Fundamental policy conflicts arise, however, when a group does not deserve to bear the costs of the restraint but where compensation would undermine the purpose of the restriction. For example, compensating blood donors for the fact that they cannot sell their blood would convert the process into something similar to a market trade and would undermine the use of a modified inalienability rule to assure high quality blood supplies. If the distributive costs are believed to be high in such situations, policymakers should consider alternatives to inalienability rules.

These issues are addressed first in the context of rules that restrict the transferability of entitlements (i.e., modified inalienability and modified property rules). I then examine rules that limit ownership and use and that may require certain actions as a condition for retaining a property right. Throughout the analysis I point first to market failures that may justify the use of inalienability rules and then discuss the most important distributive consequences.

18. Without this principle, antitrust laws and statutes that regulate public utilities would require the state to compensate monopolists for their loss of monopoly power. See Rose-Ackerman, Unfair Competition and Corporate Income Taxation, 34 Stan. L. Rev. 1017 (1982) (applying this argument in the context of competition between nonprofit and for-profit firms).

19. See Blume & Rubinfeld, Compensation for Takings: An Economic Analysis, 72 Calif. L. Rev. 569 (1984); Wittman, Liability for Harm or Restitution for Benefit?, 13 J. Legal Stud. 57, 65–66 (1984).

20. See infra notes 63–64 and accompanying text.

B. *Modified Inalienability Rule*

Modified inalienability provides a useful starting point because of the range of possible rationales for permitting gifts while outlawing sales. The most important efficiency justifications are: (1) conservation and supply management; (2) the regulation of close substitutes; and (3) the assurance of high quality output. I argue that each of the efficiency claims has merit in a restrictive range of circumstances but that using modified inalienability to achieve distributive goals is unjustified except to prevent monopoly gains.

1. *Conservation and Supply Management.* — The law may sometimes prohibit payment of suppliers because of the very responsiveness of supply to price that is the hallmark of a properly functioning market. The problem is an inefficiency caused by the market itself. If market trades are permitted, supply will be larger than under a modified inalienability rule. Suppose, however, that high levels of supply impose external costs on society, which are not reflected in market price. Outlawing sales is then a possible way to improve the allocation of resources. Two examples will illustrate this point: population control and the conservation of wild animals and primitive cultures.

Those concerned with the social costs of overpopulation may wish to restrict the freedom of individuals to decide how many children to bring into the world. They may not only support family planning, subsidized abortions, and birth control but also oppose a legalized market in adoptions. They may want to prohibit the sale of babies for fear that women will produce children for profit, thus exacerbating the problem of overpopulation. As Robert Pritchard notes, however, the prohibition has resulted in shortages of newborn children available for adoption, thereby "leaving many couples deprived of the privileges and joys of child rearing."[21] Thus he raises the issue of concentrated costs to justify using the market even in this context. The difficulty with this argument is that even with a legal adoption market some people will be unable to adopt children because the price will be too high. All adoption policies have distributive consequences for both parents and children. It is not at all obvious, for example, that children themselves would generally be worse off if the sale of newborn infants were permitted. So long as an adoption market is not ruled out ex ante on moral

21. Pritchard, A Market for Babies?, 34 U. Toronto L.J. 341, 342 (1984). But cf. Landes & Posner, The Economics of the Baby Shortage, 7 J. Legal Stud. 323 (1978) (defending a market for adopted children). The "sale" of children is not entirely illegal. Although outright sales are forbidden, "family compacts" in which a mother gives up her child in return for promises of monetary support either for herself or for herself and her child have been upheld in some jurisdictions so long as the arrangement promotes the child's welfare. See, e.g., Clark v. Clark, 122 Md. 114, 89 A. 405 (1913) (mother permitted to give up her child to her wealthy father-in-law in return for his agreement to support the mother for life); Enders v. Enders, 164 Pa. 266, 30 A. 129 (1894) (upholding a grandfather's promise to raise his grandson in return for payments to his son's wife and to the child).

grounds, the issues are largely empirical: How responsive is supply to price? What would be the impact on children and on prospective parents? How would the costs and benefits be distributed?

Consider next the conservation of wild animals. Conservation objectives may be furthered by preventing the commercial exploitation of endangered species through laws that permit the use of the resource for fun (or survival), but not for profit. The best American example is the regulation of wild fish and game resources. It would not violate public policy with respect to fish and game if a hunter, while on a vacation trip, happened to be lucky, shot more pheasants than he could use, and sold a few to friends. If sales were permitted, however, other people might decide to take up hunting because of the profitable opportunities available. Thus, a number of states have rules against sales.[22] These laws facilitate conservation by discouraging the entry of profit seeking hunters or fishermen.

A similar problem arises when the state wishes to preserve a group's way of life. Once again, a modified inalienability rule can help accomplish this aim. Recent federal laws and treaties preserve the right of Eskimos and other Alaskan natives to hunt certain kinds of game in spite of more stringent controls on the general public.[23] These native groups are, however, sometimes prohibited from selling their catch.[24] Without such a prohibition, outsiders and profit-motivated tribal leaders might invest in the tribe's activities and in the process both destroy tribal life and undermine the conservationist aims of the general prohibitions.

22. See, e.g., Me. Rev. Stat. Ann. tit. 12, §§ 7452(9)(A), 7456(5), 7457(3), 7615 (1964 & Supp. 1984–85); N.Y. Envtl. Conserv. Law §§ 11-0536, -1319(2), -1705(10), -1729 (McKinney 1984 & Supp. 1984–85); Tex. Parks & Wild. Code Ann. §§ 65.102, 66.111, 76.039 (Vernon 1976 & Supp. 1985); Wis. Stat. Ann. §§ 29.415(4), 29.48 (West 1976 & Supp. 1984–85); cf. Mass. Ann. Laws ch. 131, §§ 22, 25, 26A (Michie/Law. Co-op. 1972 & Supp. 1985) (excepting a few fur-bearing animals); Va. Code §§ 29-154, -161.1, -164 (1979 & Supp. 1984) (same).

23. Eskimos are explicitly exempted from some provisions of both the Endangered Species Act of 1973, 16 U.S.C. § 1539(e) (1982), and the Marine Mammal Protection Act of 1972, 16 U.S.C. § 1371(b) (1982). Certain treaties permit American Indians to take migratory bird species for food and clothing but not for sale. See Convention Between the United States and Great Britain for the Protection of Migratory Birds, Aug. 16, 1916, art. II, § (1), (3), 39 Stat. 1702, T.S. No. 628; Convention for the Protection of Migratory Birds and Birds in Danger of Extinction and Their Environment, Mar. 4, 1972, art. III, § 1(e), 25 U.S.T. 3329, T.I.A.S. No. 7990. Only one federal law gives Indians an explicit exemption. See Bald Eagle Act of 1940, ch. 278, § 4, 54 Stat. 251 (codified as amended at 16 U.S.C. § 668a (1982)) (allowing Indians to obtain permits to kill eagles for religious purposes). See generally Coggins & Modroin, Native American Indians and Federal Wildlife Law, 31 Stan. L. Rev. 375 (1979) (exploring the conflict between Indian rights and federal wildlife law).

24. Under both the Endangered Species Act and the Marine Mammal Protection Act, Alaskan natives may hunt endangered or threatened species if these are used "primarily" for subsistence or are made into "authentic native articles of handicrafts and clothing." 16 U.S.C. §§ 1317(b), 1539(e) (1982).

2. *Regulating Close Substitutes.* — Sometimes a free market has no adverse effects on the production and distribution of a good but instead complicates some other public policy. For example, if it is difficult for buyers and law enforcement officials to distinguish between a forbidden good and a close substitute, preventing sale of the substitute can aid enforcement of a law against possession or transfer of the forbidden good. To illustrate, consider the use of modified inalienability rules in the Endangered Species Act and the Migratory Bird Treaties. Since there is apparently no reliable way to date stuffed animals, fur, feathers,[25] and most other animal products, enforcement is simplified if the law prohibits all sales of a species, not just the sale of animals killed after the law's effective date.[26]

When a modified inalienability rule makes the administration of a law inexpensive and convenient, there is a strong argument for compensating those who find that their possessions have unexpectedly fallen in value. Otherwise the state would not need to take into account

25. See Andrus v. Allard, 444 U.S. 51, 58 (1979). Plaintiffs, however, claimed that even if feathers could not be dated, "feathered artifacts" (e.g., Indian headdresses) could be dated. Id.

26. In United States v. Richards, 583 F.2d 491 (10th Cir. 1978), both the majority and the dissent recognized that an Interior Department rule defining migratory birds to include those raised in captivity is administratively convenient "since it is impossible in most cases to determine whether the bird in the hunter's bag is one raised in captivity or taken from the wild." Id. at 497 (Logan, J., dissenting). The court upheld the regulation and rejected the argument that prohibiting sales of captive birds would reduce the supply. Id. at 496.

In Delbay Pharmaceuticals v. Department of Commerce, 409 F. Supp. 637 (D.D.C. 1976), brought under the Endangered Species Act, the Commerce Department seized Delbay's inventory of imported spermaceti. Delbay argued that it should be able to sell its spermaceti because it was imported before the law went into effect. In rejecting Delbay's claim, the court emphasized administrative difficulties: "If plaintiff's spermaceti were allowed to enter interstate commerce, it could greatly increase the enforcement difficulties. A total ban is easier to enforce than a partial ban. If there were a continued market in this country for spermaceti, it might encourage the illegal taking of sperm whales to supply this market." Id. at 642.

Similarly, in Andrus v. Allard, 444 U.S. 51 (1979), the Supreme Court upheld a prohibition on the sale of eagles and products made of eagle feathers even though the eagles were killed before the law went into effect. Gift giving, however, was expressly permitted by the Court. See id. at 66; see also United States v. Hamel, 534 F.2d 1354, 1356 (9th Cir. 1976) (requiring government to prove that a bird was killed after the Migratory Bird Treaty Act took effect would undermine the purpose of the Act).

An early district court decision, in contrast, rejected administrative convenience as a rationale for the Migratory Bird Treaty Act. See United States v. Fuld Store Co., 262 F. 836 (D. Mont. 1920). In upholding a person's right to hold and sell items made from heron feathers, the court argued that "[a]n intent on the part of Congress to virtually outlaw and destroy such property ought not to be assumed, unless very clear and the only reasonable construction of the act; for it is very doubtful if Congress has any such power . . . . [S]ome incidental advantage in administration of the law . . . avails nothing." Id. at 837–38; see also In re Informations Under Migratory Bird Treaty Act, 281 F. 546 (D. Mont. 1922) (construing Act not to apply to transactions involving birds taken before effective date).

the full costs of its policy, and a group that is unlucky enough to own a close substitute for the regulated product bears a disproportionate share of the cost. The case of *Andrus v. Allard*[27] provides an example. The statutes at issue prohibited the killing of eagles after a certain date. To ease the administration of the statutes, the Secretary of the Interior issued regulations prohibiting the sale of eagles killed before that date. The effect of the prohibition was to reduce the value of Indian artifacts made of "old" eagles by changing the owners' legal entitlement from a pure property rule to a modified inalienability rule. The owners challenged the statutes on the grounds that they constituted an unconstitutional "taking" of property requiring payment of compensation.[28]

The Supreme Court accepted the administrative convenience rationale behind the Interior Department regulations and rejected the owners' compensation claims on the ground that no "taking" had occurred. The government had not "physical[ly] inva[ded]" the owners' property, and had prevented only "one means of disposing of the artifacts."[29] The Court, however, never directly faced the important issue of whether the payment of compensation would undermine the reasons for promulgating the rule in the first place. In particular, in setting up a compensation scheme, the Interior Department would have faced the problem of distinguishing between legitimate holders of "old" eagle feathers and those making dishonest claims. In fact, however, a number of alternatives were open to the Interior Department that would have provided some form of compensation without undermining the legislative purpose. Before the protective law took effect, for example, holders of eagles and eagle feathers could have been required to obtain licenses certifying the legality of their holdings. Sales would then have been legal only if owners had licenses. Alternatively, the government might have stood ready to purchase all specimens presented to it by a certain date, or licensed holders could have retained possession but been paid compensation.

3. *Quality Control.* — In an influential book on human blood, Richard Titmuss[30] argues for modified inalienability on quality control

27. 444 U.S. 51 (1979).

28. Id.

29. Id. at 65. In addition to possession and transportation of their property, the owners could also "donate or devise the protected birds" and could "exhibit the artifacts for an admissions charge." Id. at 66.

In a related case involving a man who raised falcons, a court determined that because the defendant raised hawks under permits—first from Wisconsin and then from Utah—"[h]is permissive possession of the birds did not carry with it the traditional incidences of property rights. . . . At the most the states granted a partial property interest which did not encompass all usual property rights." United States v. Richards, 583 F.2d 491, 498 (10th Cir. 1978). Accordingly, the claim of unconstitutional deprivation of property was denied.

30. R. Titmuss, The Gift Relationship: From Human Blood to Social Policy (1971).

grounds. The argument, developed further by Kenneth Arrow,[31] views modified inalienability as a response to the general problems created by markets with imperfect information. If it is difficult for hospitals to judge whether blood contains the damaging hepatitis virus, while individuals know their own health history, then ideally one would design a collection system that gives contributors an incentive to reveal any past cases of hepatitis.[32] On the one hand, if people are paid for their blood, they may try to hide damaging information. On the other hand, if they are induced to donate their blood for altruistic reasons, those who have had hepatitis presumably will not make contributions. Of course, there may well be other systems of property rights—such as sale followed by liability for damages,[33] labelling by source,[34] or more careful selection of donors[35]—that respond to the quality control problem. But a purely voluntary system is, at the very least, a method worthy of serious consideration.[36]

31. Arrow, Gifts and Exchanges, 1 Phil. & Pub. Aff. 343 (1972).

32. New tests do permit better screening for hepatitis A and B, but existing procedures are still not effective for Non-A, Non-B hepatitis. See Non-A, Non-B Hepatitis, 2 The Lancet 1077 (1984). Recent concern about the transmission of AIDS through blood transfusion has raised similar issues even in the context of donated blood. See Chase, "Gift of Life" May Be Also an Agent of Death in Some AIDS Cases, Wall St. J., Mar. 12, 1984, at 1, col. 1; Results of AIDS Tests, N.Y. Times, Mar. 26, 1985, at C2, col. 5 (describing a new test that is still not completely reliable).

33. See Kessel, Transfused Blood, Serum Hepatitis, and the Coase Theorem, 17 J.L. & Econ. 265 (1974).

34. Food and Drug Administration regulations require blood to be labeled "paid donor" or "volunteer donor." R. Scott, The Body as Property 194 (1981).

35. See M. Cooper & A. Culyer, The Price of Blood (1968); Sapolsky & Finkelstein, Blood Policy Revisited—A New Look at "The Gift Relationship," 46 Pub. Interest 15 (1977).

36. The law on this subject varies. The Uniform Anatomical Gift Act (UAGA), 8A U.L.A. 15 (1983), which has been adopted by all fifty states and the District of Columbia, treats only gifts from dead bodies; it does not resolve the legal status of sales from either the living or the dead. A commissioner's note to § 3 states: "The statutes in a few states specify that no donor shall ask compensation and no donee shall receive it. Several statutes provide that storage banks shall be non-profit organizations. On the other hand, most of the states have chosen not to deal with this question. The Uniform Act follows the latter course in this regard." Id. at 41; see also Stason, The Uniform Anatomical Gift Act, 23 Bus. Law. 919, 927–28 (1968) (noting that the UAGA does not address the issue of payment for gifts of body parts); cf. Note, Retailing Human Organs Under the Uniform Commercial Code, 16 J. Mar. L. Rev. 393 (1983) (advocating amendments to the UAGA to permit the sale of organs).

Russell Scott reports that in the late 1960s, Nevada, Delaware, Hawaii, New York, and Oklahoma passed laws banning payment to a person while alive for his or her body parts after death, but these laws did not prohibit the sale of the organs by next of kin. R. Scott, supra note 34, at 190. In 1969, Mississippi "authorized its citizens to sell their body parts to hospitals, which were given the right to take possession upon death. Breach of the contract necessitated repayment of the money plus interest at six percent." Id. In 1969, Massachusetts "prohibited payment to any person for any cadaver organ." Id. Scott goes on to note that most of these restrictions were abolished when the UAGA was passed "since the act was believed to exclude all sales," id., an interpretation at odds with that of the commissioners. The Delaware UAGA explicitly prohibits sales. See Del. Code Ann. tit. 24, § 1783(f) (1981).

The argument for modified inalienability, however, is not without weaknesses. First of all, the quality control benefits of gift giving operate only on the *supply* side of the market. Thus, once the blood has been collected, there is no quality control argument against selling the blood to patients.[37] One cannot contend that paying customers are generally less likely to make effective use of blood transfusions than are other users. Such a dual system may not be feasible, however. Quite simply, gifts may not be forthcoming if donors know that the collection agency is selling their gifts[38] and do not consider the collection agency to be a worthwhile charity.[39] Second, even if the blood is of high quality, the supply of donations may be insufficient to meet the demand. This problem can be mitigated by paying donors' expenses,[40] insuring them against future medical complications,[41] or providing other forms of compensation that lower the cost of donating without permitting individuals to profit financially from their blood.[42] Since such expedients may not always be effective, however, undersupply may continue to be a serious potential problem.

Moreover, even if a system of voluntary blood donations proves workable, the Titmuss proposal should not be unthinkingly generalized. Blood is a very special commodity. Once a person gives or sells some blood, more is produced "automatically" so long as the person has not sold or given away so much as to injure his health. The quality of the blood produced is not affected by the price at which it can be

37. See M. Cooper & A. Culyer, supra note 35; cf. G. Calabresi & P. Bobbitt, Tragic Choices 19–22 (1978) (distinguishing between first- and second-order determinations, i.e., between how much will be produced and who will get it).

38. See R. Titmuss, supra note 30, at 151 ("Altruistic donors can hardly be expected to give their blood to profit-making hospitals.").

39. This problem is not unsolvable. One could, for example, imagine churches or day care centers raising money by selling donated blood just as they now sell donated food, clothing, and household goods. Blood banks could merge with charities or give their proceeds to the United Way.

40. See Council of Europe, Committee of Ministers, Harmonisation of Legislations of Member States Relating to Removal Grafting and Transplantation of Human Substances, Resolution (78)28, adopted 11 May 1978 & explanatory memorandum 29. Article 9 states that "[n]o substance may be offered for profit. However, loss of earnings and any expenses caused by the removal or preceding examination may be refunded." Council of Europe, Committee of Ministers, International Exchange and Transportation of Human Substances, Recommendation R(79)5, adopted 14 Mar. 1979 & explanatory memorandum, favors outlawing sales of human tissue but authorizes payment for shipping expenses.

41. See, e.g., Comment, California's Response to the Problem of Procuring Human Remains for Transplantation, 57 Calif. L. Rev. 671, 692 (1969) (recommending that both donors and patients be insured).

42. Compensation may take the form of promises to supply blood in the future if donors or their families need it, or to make gifts in the donors' names to charities of their choice. R. Titmuss, supra note 30, at 78–88.

sold, and the quantity inside people's veins is always sufficient to meet the demand. Thus, the only quality control problem is the proper *selection* of suppliers. Furthermore, with the exception of a few people with rare blood types, there is no monopoly power problem.[43] Suppose, in contrast, that the market for used cars were outlawed and the Salvation Army encouraged people to donate cars for distribution to the needy. Since cars do not spontaneously regenerate themselves in the garages of the altruistic, it appears unlikely that many high quality cars will be given away. Yet automobiles are like blood in that individual owners know more about the quality of their cars than the buyers or donees can easily find out.[44] Even if a purely voluntary system would induce people with "lemons" to throw them away rather than donate them, the overall quantity and quality of used cars would be low.[45] As another example, suppose that the military only wanted patriotic fighters to join the armed forces but had no good way to test for patriotism. It might try accordingly to establish a volunteer army that paid only subsistence wages. This plan would be unlikely, however, to attract more than a few super-patriots, and most volunteers might instead be unemployed people with very low skill levels.

4. *Blood, Body Parts, and Fairness.* — Many people oppose the sale of blood to patients on the ground that it is unfair to allocate a basic necessity of life on the basis of ability to pay. In a competitive market, this argument seems difficult to sustain for two reasons. First, the distributive arguments against sales may not be strong enough to overcome the inefficiency of nonmarket transactions. Making free a good that actually has an opportunity cost will produce excess demand, since the value of the good to marginal consumers will exceed its marginal cost. If, in addition, suppliers are not reimbursed, quantity will be inefficiently low. Second, there may not be any distributive reason for treating the good in question differently from close substitutes. Artificial limbs are for sale, but not real kidneys. On purely distributive grounds it seems unfair to treat people whose problem requires a mechanical or chemical solution differently from those who need living tissue. In the field of health, such distinctions seem particularly problematic, since most people are covered by public or private health insurance.[46]

If the market is not competitive, however, the distributive arguments against sales may have more merit. The monopoly power issue arises most clearly in the provision of human tissue. Because overall supply is not affected by market structure, monopoly power only affects the distribution of benefits between donor and donee. Thus, if tissue typing shows that your kidney is the best one to transplant into your cousin, a bilateral monopoly situation is created,[47] and if sales are permitted, you might hold out for a large payment in return for saving your cousin's life. Similarly, some types of rare antibodies are only available from a few people and are extremely valuable in the production of certain drugs.[48] In such contexts, an entirely unregulated market could have undesirable distributive consequences if people exercise their monopoly over scarce bodily tissues and antibodies at the expense of the sick. Prohibiting sales is not, however, the only response to the problem. One could instead imitate the policy followed in more conventional cases of monopoly power by permitting sales but regulating prices so that they reflect the marginal costs and risks borne by the donor.[49]

C. *Modified Property Rule*

In contrast to modified inalienablity rules, modified property rules are relatively uncommon and apply to particular situations rather than types of goods and services. Under such rules, property may be sold at market prices but cannot be given away. Most commonly, modified

43. Cf. United States v. Garber, 607 F.2d 92 (5th Cir. 1979) (tax treatment of the earnings of a woman whose blood plasma contained a rare antigen useful to drug manufacturers).

44. The problem of low quality used cars forcing good ones out of the marketplace is analyzed in Akerlof, The Market for "Lemons": Quality Uncertainty and the Market Mechanism, 84 Q.J. Econ. 488 (1970).

45. Cf. Rottenberg, The Production and Exchange of Used Body Parts, *in* 2 Toward Liberty: Essays in Honor of Ludwig von Mises 322 (1971). Rottenberg criticizes doctors who refuse to transplant purchased organs or use purchased blood. "It is as though a coalition of plumbers had agreed that none of them would install bathroom fixtures that a household had secured in exchange for money but only those altruistically given away by appliance manufacturers." Id. at 327.

46. Even if a persuasive argument can be made against selling the entitlement to users, it may still be possible to obtain some of the benefits of market transactions by having the state purchase the good or service from suppliers for free distribution to the public based on nonmarket criteria. Thus, if there is an inadequate supply of organs from cadavers for transplant under an entirely voluntary system, people could be paid by the state for promising to donate their organs with the allocation based on medical judgment. Of course, if this change in practice substantially increases supply, then the need for difficult distributive choices by hospitals and doctors will be reduced since supply will more nearly equal demand. For proposals along these lines, see Brams, Transplantable Human Organs: Should Their Sale Be Authorized by State Statutes?, 3 Am. J.L. & Med. 183 (1977); Dukeminier, Supplying Organs for Transplantation, 68 Mich. L. Rev. 811 (1970); Sanders & Dukeminier, Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation, 15 UCLA L. Rev. 357 (1968); Note, Compulsory Removal of Cadaver Organs, 69 Colum. L. Rev. 693 (1969); Note, The Sale of Human Body Parts, 72 Mich. L. Rev. 1182 (1974).

47. See, e.g., Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969); McFall v. Shimp, 10 Pa. D. & C.3d 90 (1978).

48. See, e.g., United States v. Garber, 607 F.2d 92 (5th Cir. 1979).

49. Of course, other personal attributes that give people monopoly rents are not so regulated: great beauties, highly skilled athletes, and geniuses frequently earn monopoly profits. One problem with taxing the returns to beauty, strength, and intelligence, however, is that individuals should be given an incentive to develop their natural gifts. In contrast, although people can be compensated for the time, trouble, and risk of organ removal, they cannot affect their tissue type.

property rules have been imposed on people who are either insolvent or about to die. In both cases, these rules solve problems that arise because someone with an interest in the property has no formal legal claim until some event, i.e., bankruptcy or death, occurs. These difficulties are examples of the agency-principal problems familiar to economic analysts in contexts as different as shareholder control of corporate managers and the relationship between insurance companies and their customers.[50] The restriction on gifts substitutes for laws that directly control the relationship between the parties. The modified property rule is a second-best way of recognizing the property interests of creditors, heirs, and tax collectors in situations where the nominal owner may choose to overlook their claims.

Consider bankruptcy law first. Gifts made before a declaration of bankruptcy are condemned as "fraudulent conveyances," but sales of assets are legal so long as "reasonably equivalent value" is received.[51] Without this restriction on gifts, a person who became insolvent could simply give away all his assets to family and friends, go bankrupt, and then accept reciprocal gifts from them afterwards. This practice would introduce an element of risk into the making of loans that would serve no productive purpose. Ex ante the volume of loans would be inefficiently low and interest rates inefficiently high to take account of this possibility of hiding assets from creditors.

In contrast, prohibitions on gifts made close to the time of death can be justified mainly on distributive grounds. Originally, such rules protected heirs against pressure applied by clerics and doctors to dying relatives.[52] At present, the laws of most states and the federal government do not prevent gifts made close to the time of death. However, a weak form of modified property rule remains the legal standard for death related transactions: certain gifts made within three years of death are treated as part of one's estate for tax purposes. The purpose of this rule is to protect the state against the tax avoidance activities of

50. See, e.g., Ross, The Economic Theory of Agency: The Principal's Problem, 63 Am. Econ. Rev. (Papers & Proceedings) 134 (1973); Shavell, Risk Sharing and Incentives in the Principal and Agent Relationship, 10 Bell J. of Econ. 55 (1979).

51. 11 U.S.C. § 548(a) (1982). See generally J. Hanna & J. MacLachlan, Cases & Materials on Creditors' Rights and Corporate Reorganization 204–22, 233–55 (1957) (discussing the Uniform Fraudulent Conveyance Act and providing excerpts from the leading cases).

52. In Louisiana, for example, gifts to either doctors or "ministers of religious worship" cannot be made by a sick person who dies of his illness. The person may, however, pay for services rendered. La. Civ. Code Ann. art. 1489 (West 1952). In Georgia, no one with a spouse or child may devise more than one-third of her estate to charitable or religious institutions if the will is executed within 90 days of the person's death. Ga. Code Ann. § 53-2-10 (1982). Similarly, old treatises on gifts note that a gift to one's "spiritual adviser" will be regarded with suspicion by courts especially if made *mortis causa*. See, e.g., W. Thornton, A Treatise on the Law Relating to Gifts and Advancements 456 (1893).

dying individuals and their heirs.[53]

D. *Limits on Ownership and Use*

Restrictions on ownership and use will sometimes be effective second-best substitutes for more flexible, incentive-based systems of externality control. In this section, I consider a wide range of such restrictions, from limits on who may drive automobiles to controls on the use of historic buildings and undeveloped land. In practice, of course, externality control is not a central reason for many existing limitations. Instead, they are based on paternalistic motives or are blatantly designed to create monopoly rents. My purpose is not to justify such restrictions but rather to indicate the narrow range of cases where economic efficiency may be furthered by limiting who may use or own a product and what may be done with it.

1. *Restrictions on Ownership.* — Ownership restrictions work in conjunction with the tort law system to prevent conduct dangerous to third parties.[54] They prevent groups of people, e.g., people under sixteen or those with diabetes, from owning certain goods or engaging in certain activities, e.g., purchasing liquor, driving a car, or obtaining a pilot's license. Inalienability rules of this kind are second-best methods of control because they treat all members of a group alike. These restrictions thus are likely to be both over- and underinclusive. In contrast, a tort law system, requiring compensation ex post, can be sensitive to individual differences in behavior but may be costly and time-consuming to implement. In practice, we have a mixed system which combines ex ante restrictions with ex post liability. Tort law emphasizes those practices that are inherently most difficult to measure ex ante. For example, while tests of driving ability, knowledge of traffic laws, and color blindness determine who will obtain a driver's license, the possibility of a tort suit after an accident is likely to deter people from driving carelessly.

The use of statistical evidence to sort out applicants is efficacious if the measuring rod is directly related to behavior. Proxies are often used, however, because of measurement difficulties. Simple criteria such as age can often be understood as substitutes for more complex criteria such as health status or ability where problems of measurement

53. In recent years the consolidation of the gift and estate tax systems has mooted the problem of determining intent. Yet, since the federal government taxes gifts differently from sales, it becomes important to define a sale. Within three years of death, the IRS will scrutinize sales to be sure that "adequate consideration" in money or money's worth has been received. If the IRS is not satisfied, the balance will be taxed as if it were a gift. See T. Englebrecht, M. Moore & A. Fowler, Federal Taxation of Estates, Gifts and Trusts 61–66 (1981).

54. See generally Calabresi, Torts—The Law of the Mixed Society, 56 Tex. L. Rev. 519 (1978) (examining the roles of the tort system and direct regulation of behavior in controlling risk).

ex ante and of attributing causation ex post are likely to be serious. Thus, if there is a strong statistical relationship between the age of an automobile driver and the probability of being in an accident, the state can forbid people below a certain age from driving cars instead of designing a costly individualized test to sort out the careful children. Costs are imposed on careful children by this method of accident prevention, but they must be balanced against the costs of more discriminating tests.[55]

There are limits to this method, however. We seem to be reluctant to use statistical patterns to distinguish between people on the basis of demographic criteria beyond their control. Thus, we do not allow white women to drive at an earlier age than males and blacks, even though the statistical evidence shows that white women are safer drivers.[56] Age, however, is less suspect than race or gender since all people age at the same rate and is, therefore, frequently used as a basis for distributing benefits and burdens. Furthermore, even though a demographic characteristic is something over which an individual has no control, it may still be used to distinguish between people if the causal link is well established and close to being deterministic. Thus, diabetics may be prevented from obtaining commercial pilots' licenses or driving trucks with hazardous cargoes, and color-blind people may be unable to obtain drivers' licenses.[57]

Ideally, people should be compensated for unfair burdens resulting from the use of statistical regularities instead of individual behavior. Compensation is impossible, however, for just the reason that statistical

55. Another factor is whether the tests will in fact screen effectively. Some states attempt to screen out more careful younger drivers by requiring that 16 and 17 year-olds complete driver education courses before obtaining licenses. See, e.g., Cal. Veh. Code § 12057 (West 1971). At 18, anyone who passes the state test can obtain a license. See, e.g., id. § 12512. Two commentators have argued, however, that such statutes achieve precisely the opposite result: increasing the number of 16 and 17 year-old drivers increases the automobile accident death rate. See Robertson & Zador, Driver Education and Fatal Crash Involvement of Teenaged Drivers, 68 Am. J. Pub. Health 959 (1978).

56. See Underwood, Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment, 88 Yale L.J. 1408, 1434–42 (1979) (distinguishing between measures beyond the control of people and those that can be affected by their behavior). The most prominent suspect criteria are race, sex, and national origin. See U.S. Const. amend. XIV, § 1; Civil Rights Act of 1964, 42 U.S.C. § 2000a (1982); Equal Employment Opportunity Act, 42 U.S.C. § 2000e (1982). Other criteria include age, see Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1982), Age Discrimination Act of 1975, 42 U.S.C. § 6101 (1982), and physical handicap, see Rehabilitation Act of 1973, 29 U.S.C. § 701 (1982), Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6000 (1982).

57. Because of a concern for accident risks, the Federal Highway Administration prohibits diabetics on insulin from driving trucks in intercity or interstate commerce. See Hricko, Drivers of Hazardous Cargoes—Legal Aspects of a Maximum Age and Increased Physical Requirements, 31 Fed'n Ins. Couns. 126, 130 (1981). New York City taxi drivers are similarly restricted. N.Y. City Admin. Code, ch. 65, § 2305 (1975).

evidence is used initially to limit ownership and use: individual distinctions are costly or impossible to make.

Even though I have treated ownership restrictions as a second-best response to controlling externalities, I have idealized their role. In practice, such restrictions frequently are designed to give some profession or occupation monopoly power. It is, for example, very difficult to argue that most professional licensure laws are primarily concerned with quality control.[58] Simple restrictions on the number of market participants also are generally explicit grants of monopoly power to a limited group. While limits on the number of taxicabs in a city may reduce traffic congestion, they also benefit license holders;[59] restrictions on the number of bank offices in a state[60] do not even have a limited market failure rationale. Thus, while a combination of externality control and administrative convenience may justify some restrictions, the possibility of such a justification should not create a presumption in favor of these regulations.

2. *Required Use.* — Some entitlement regulations require a small set of actions while permitting a wide range of other uses. As a condition for retaining ownership, the law may mandate actions that produce positive externalities. These regulations substitute for market-oriented systems that pay a subsidy set equal to the external benefits such actions produce.

58. Cf. Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3, 13–17 (1971) (occupational licensing uses the political process to improve a group's economic circumstances); Brill, Protection for the Hard of Hearing: State and Federal Regulation of Hearing Aid Dealers, 27 DePaul L. Rev. 45, 86–87 (1977) (boards "dominated by members of the industry" help thwart statutory purpose of protecting hard of hearing).

59. Given the casual, short-term nature of individual taxi rides, state regulation of some aspects of quality appears justified. Thus both Chicago and New York require that vehicles be safe to operate. In New York inspections are required every four months, and vehicles must be equipped with emission control devices. Similarly, in both cities, drivers must have a special taxi driver's license that requires them to be in sound physical condition and of good moral character. In New York the law states that applicants will be examined on their knowledge of the city. See N.Y. City Admin. Code, ch. 65, §§ 2301–2319 (1975). Although these restrictions on the ownership and use of taxicabs appear justified on efficiency grounds, limitations on entry, which are less easy to justify, accompany them. See Kitch, Isaacson & Kasper, The Regulation of Taxicabs in Chicago, 14 J.L. & Econ. 285 (1971).

60. See generally Note, Bank Charters, Branching, Holding Company and Merger Laws: Competition Frustrated, 71 Yale L.J. 502 (1962) (summarizing laws governing entry into banking). Some statutes and court decisions, however, seek to foster competition. See, e.g., Moran v. State Banking Comm'r, 322 Mich. 230, 243, 33 N.W.2d 772, 778 (1948) (charter statute should be used "not to deter competition or foster monopoly, but to guard the public and public interest against imprudent banking") (quoting State ex rel. Dybdal v. State Sec. Comm'n, 145 Minn. 221, 224–25, 176 N.W. 759, 760 (1920)); Central Bank v. State Banking Bd., 509 S.W.2d 175, 184 (Mo. Ct. App. 1974) (convenience and needs standard does not contemplate preventing new banks "from entering a market because existing banks are rendering adequate service"); Bank Holding Company Act of 1957, § 1, Ill. Ann. Stat. ch. 17, § 2501 (Smith-Hurd 1981).

Two examples are especially interesting: historical preservation and preservation of the habitats of endangered species. Historical preservation statutes typically require that owners preserve at least the facades of certain buildings. Permission is required for any alterations to the affected portions of the building and demolition is permitted only under very restricted conditions. For example, the New York City Landmarks Preservation Law emphasizes the protection and preservation of external architectural features and internal features, such as building lobbies or auditoriums, that are open to the public, and it only rarely allows demolition.[61] Similarly, the Endangered Species Act may require landowners to avoid destroying the habitat of an endangered species.[62] Both of these policies can be justified by the external benefits of maintaining the affected property in its original form.

Two problems militate against regulatory statutes that require preservation. First, they may lead to too much or too little preservation because the government's criterion of value will not always equal the opportunity costs of foregone development. Second, in the absence of countervailing subsidies, the cost of preservation is borne by those who own the property at the time the law is promulgated, unless, of course, the law actually increases property values.[63] But both the problem of inefficient preservation and the problem of concentrated costs can be avoided by a law that pays owners a bounty to preserve their land or buildings. This system could be more efficient than outright prohibitions if the bounty were set equal to the external benefits of preservation. Historical buildings would be torn down and habitats destroyed only if their external benefits were too low to justify their preservation given the land's alternative uses.[64] Although in practice quantifying these benefits is very difficult, attempts to do so will frequently be preferable to required use regulations when the effect of the latter is to impose all the costs on the producer of the social benefits.

3. *Limits on Use.* — Conversely, other laws forbid certain activities in an attempt to limit negative externalities. For example, land use

61. N.Y. City Admin. Code, ch. 8-A, §§ 207-1.0(g), (m), (n), -5.0(a), -6.0, -10.0 (1976). The law's basic purpose is outlined at § 205-1.0(b).

62. A recent court of appeals decision can be read to support this view even though it dealt with the State of Hawaii rather than private landowners. See Palila v. Hawaii Dep't of Land & Natural Resources, 639 F.2d 495 (9th Cir. 1981); Note, *Palila v. Hawaii Department of Land & Natural Resources*: A New Interpretation of "Taking" Under the Endangered Species Act of 1973, 19 Idaho L. Rev. 157 (1983) (arguing for a broad reading of the *Palila* case).

63. D. Listokin, Landmarks Preservation and the Property Tax (1982), summarizes recent research, including evidence on both increases and decreases in property values under historical preservation statutes. Rose, Landmarks Preservation in New York, Pub. Interest, Winter 1984, at 132, 142, argues in favor of compensation. Rough approximations of this policy are property tax reductions, rapid depreciation of rehabilitation expenses and, in urban areas, markets in air rights. See Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

64. See Wittman, supra note 19, at 75.

zoning laws may prevent owners from using their land for certain things such as a store or a factory but may permit apartment buildings so long as maximum density requirements are met and sewer and water lines are provided.[65] Zoning laws do not require development as a condition of ownership; rather, their economic function is to control the externalities of development *if* it occurs.

Here too, the regulations are second-best substitutes for a policy that balances the benefits and costs of development in individual cases.[66] They also have some of the same undesirable distributive costs as laws requiring certain actions. Once again, those who own the land at the time the zoning law is passed bear the cost along with those who would have benefited if the property had been put to its most profitable use. The purchase of development rights by government is a noncoercive alternative to zoning that forces the state to take into account the costs of restricting land use. In a few jurisdictions this policy has been applied to farmland.[67]

E. *Coerced Use*

I use the term "coerced use" to apply to situations in which all permitted activities are also required. When the government sells, leases, or gives property to private individuals, the state may impose restrictions in an attempt to control the use of the property. If the property is sold to the highest bidder, the regulations will adversely affect government revenues if they require owners to restrict their pursuit of profitable opportunities. How, then, can it be in the public interest to impose such controls? While some such restrictions have little to recommend them on normative grounds, others can be justified by appeals to efficiency and distributive justice. I discuss four rationales in turn: agency-principal problems that arise from the nature of the contractual situation, avoidance of a "prisoner's dilemma," the entitlement holders' poor information and inability to fend for themselves, and the

65. See generally E. Roberts, The Law and the Preservation of Agricultural Land (1982) (summarizing the development of zoning laws in the United States).

66. Because zoning is a local government function, however, it can itself produce external costs. Large lot zoning in the suburbs combined with selective zoning for industry contributes to the clustering of dirty industry and poor, minority families in central cities or old industrial towns while some suburbs maintain themselves as wealthy enclaves. The wealthy are preserving themselves from the negative externalities of living near the poor, but as a consequence they impose costs on the poor by limiting their locational choices. Neither efficiency nor fairness supports this kind of narrowly focused residential zoning. See Mills, Economic Analysis of Urban Land-Use Controls, *in* Current Issues in Urban Economics 511 (P. Mieszkowski & M. Straszheim eds. 1979).

67. For example, the Suffolk County government on Long Island will purchase farmers' "development rights" up to the limit of its budget. The value of these rights is the difference between the value of the property for its highest and best use and its value for agricultural purposes. See E. Roberts, supra note 65, at 76. Less ambitious programs are in effect in Connecticut, Massachusetts, New Hampshire, and New Jersey. Id. at 83–87.

distribution of scarce benefits to the worthy. Three applications are stressed: federal leasing programs for natural resources, the Homesteading Acts of the nineteenth century, and government transfers to the needy.

1. *Contracting Problems: Mineral Leases.* — The federal government sells (or gives away) leases that permit private individuals and firms to exploit natural resources on federal lands and on the continental shelf. Most of these leases—e.g., for coal and oil—provide that holders forfeit their claims if they do not actually extract the resource.[68] A leaseholder who does not wish to exploit the resource, however, can assign or sublease to someone else.[69] These leases thus are pure property entitlements with coercive use.

Coercive conditions will further efficiency only if they help correct agency-principal problems in the basic lease. Under most federal leases, leaseholders must pay a royalty of x percent on sales proceeds.[70] Agency-principal problems arise because one hundred dollars' worth of sales is only worth $(1-x)$ dollars to the lessee. Shifting to the lessee the costs, but not all of the marginal gains, leaves the lessee too little incentive to prospect and exploit the resource. The royalty is inefficient ex post but may be desirable ex ante as a way of sharing the risks of exploitation between the government and the private firm. If such risk sharing is deemed desirable, then a "due diligence" requirement will help correct the inefficiency created by the royalty scheme.[71]

Arguments in favor of restrictive clauses are more difficult to make, however, where the lease is granted in return for a fixed payment. Such provisions are justifiable where market imperfections such as monopoly power or systematically biased information discourage current production.[72] Absent market imperfections, however, due diligence requirements in such leases encourage excess exploration in the present, controlled only by the government's decision on the quantity of leases to make available each year.

2. *"Prisoner's Dilemmas."* — It is difficult to be a pioneer in an empty land. Life is easier with neighbors who can help in emergencies, share farm equipment, and assist in capital projects such as construction. Furthermore, as more people settle in a given area, more specialized tradesmen, such as blacksmiths and carpenters, will move in, and villages will be built. Since it is easier to develop one's land once others are nearby, everyone has an incentive to wait for everyone else. Speculators with no interest in farming may purchase some land and hold it for resale. In some markets, speculators can serve a useful economic function, but here they can exacerbate the "prisoner's dilemma."[73]

68. See Federal Land Policy and Management Act of 1976, § 302, 43 U.S.C. § 1732 (1982); Outer Continental Shelf Lands Act, ch. 345, 67 Stat. 462, § 6(10), 43 U.S.C. § 1337(b)(2)(B) (1982); Mineral Leasing Act of 1920, ch. 85, 41 Stat. 437, § 7, 30 U.S.C. § 207 (1982); Kalter & Tyner, Disposal Policy for Energy Resources in the Public Domain, *in* Energy Supply and Government Policy 51 (R. Kalter & W. Vogely eds. 1976); Nelson, Undue Diligence: The Mine-It-Or-Lose-It Rule for Federal Coal, 7 Reg. 34 (Jan.-Feb. 1983). Judicial doctrines governing underground coal gasification contain similar holdings. Note, Implied Covenants and the Duty to Develop in Underground Coal Gasification, 59 Tex. L. Rev. 1303 (1981). The Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, 90 Stat. 1083 (1976) (codified in scattered sections of 30 U.S.C. (1982)), requires development of future coal leases within 10 years, id. § 6, at 1087 (codified at 30 U.S.C. § 207 (1982)), but does not cover leases issued before 1976 unless the lessees consent. Id. § 5(b)(5), at 1086 (codified at 30 U.S.C. § 202a(5) (1982)).

Oil and gas leases are subject to automatic termination for nonpayment of rent unless there is a well on the property capable of producing oil or gas in paying quantities. 30 U.S.C. § 188(b) (1982). However, the rent is generally set at a minimal fee per acre so that this requirement is not onerous. In practice, leases are seldom terminated for failure to exploit the resource. Council on Economic Priorities, Leased and Lost: A Study of Public and Indian Coal Leasing in the West, 5 Econ. Priorities Rep., No. 2 (1974) [hereinafter cited as Council on Economic Priorities]. Even if one observes no active enforcement, however, the law may still affect both leaseholder behavior and the bid prices for contracts so long as bidders think the provision has some chance of being binding.

69. The sublease must be approved by the Secretary of the Interior. 30 U.S.C. § 187 (1982). At least for oil and gas leases, assignments or subleases can be disapproved "only for lack of qualification of the assignee or sublessee or for lack of sufficient bond." 30 U.S.C. § 187a (1982).

70. Low royalties of 8% to 12.5% are common. The royalty can be reduced if the lessee demonstrates that lease stipulations make development of a tract uneconomical. Kalter & Tyner, supra note 68, at 56–57.

71. Private oil and gas leases also frequently contain profit-sharing provisions combined with clauses requiring the lessee to explore for resources and to exploit them if found. For summaries of the current state of the law in this area, see Comment, The Implied Covenant to Reasonably Develop: Should Hard-Mineral Applications Follow Oil and Gas Precedent?, 20 Hous. L. Rev. 883 (1983); Note, Oil and Gas: Preservation of Leaseholds Following Well Failure, 36 Okla. L. Rev. 151 (1983). For an historical overview, see Swenson, Legal Aspects of Mineral Resources Exploitation, *in* P. Gates, History of Public Land Law Development 699 (1968).

72. Nelson, supra note 68, at 36–38. The Department of Interior, however, apparently has not enforced these provisions vigorously. Council on Economic Priorities, supra note 68, at 28.

73. The prisoner's dilemma game between individuals A and B has the following form where B's net returns are listed first in each box.

		A	
		Develop Now	Develop Later
B	Develop Now	10, 10	6, 12
	Develop Later	12, 6	7, 7

If both develop now, they share the social overhead costs and maximize total benefits. If both wait, they also share costs and lose the profits of early developments. If A develops later while B develops now, B must bear all the startup costs and cannot prevent some of the benefits of this investment from accruing to A. Total benefits are less with sequential development either because the early entrant underinvests in social overhead capital or because of scale economies from joint production.

Substituting (0,0) for (7,7) in the above matrix would create a game called "leader."

Everyone is better off if all settle than if no one settles, but if others settle, then it is best for each person to wait until others have overcome the initial hardships.

One way around the dilemma is to impose a conditionally coercive entitlement rule designed to encourage settlement. The original Homesteading Acts in nineteenth century America, for example, gave people land for a nominal fee after they certified that they had worked the land for five years.[74] The land could not be sold or given away to private individuals during that period. If a homesteader did not complete his term of resident farming, the land was forfeited to the state. The people attracted to the territory by this program both made future economic development easier and aided the political ambitions of the original residents who sought to move their territories toward statehood. Thus, in my terms, the entitlement rule was conditionally coercive, and hence more restrictive than the transferable mineral leases discussed above.[75]

At present, the prisoner's dilemma may well provide an important justification for subsidized housing programs with coercive conditions. Poorly maintained housing affects the value of neighboring property with the net result that no one may find it worthwhile to incur maintenance expenses. If all could be induced to upgrade their property, all would benefit. Subsidies could be provided to landlords and homeowners on the condition that they fix up their property. However, if property owners can sell their upgraded assets to the highest bidder, a subsidy program of this kind is not conditionally coercive. Conditional coercion arises when the government wishes not merely to improve neighborhood quality but also to make it possible for the former residents to remain in the newly upgraded housing. Thus, landlords may be forbidden to evict tenants and tenants may be eligible for subsidy only if they live in apartments that fulfill housing code standards.[76] Similarly, urban homesteading programs, which are quite self-consciously modeled after the homesteading programs for nineteenth century farmers, encourage low and moderate income people to fix up old housing and impose resale restrictions to ensure that the rehabilitated building continues to provide housing for families with low and moderate incomes.[77]

In this game, each participant would try to be the first to announce that he would develop later in order to induce the other player to develop now.

74. See Act of May 20, 1862, ch. 75, 12 Stat. 392; P. Gates, supra note 71, at 393–99.

75. See P. Gates, supra note 71, at 393–99. Eventually, the conditionally coercive features of the Homesteading Acts were weakened by the addition of a commutation clause. Homesteaders could purchase their claim outright after a residence of fourteen months. Act of Mar. 3, 1891, ch. 561, § 6, 26 Stat. 1095, 1098; F. Shannon, The Farmers' Last Frontier, Agriculture, 1860–97, at 51–75, 5 The Economic History of the United States (1945). As a contemporary author pointed out, this clause converted the law into little more than a way of redistributing income to people willing to make a minimal investment in the land. See Hughes, The Abuse of the Homestead Law, 14 Am. Law. 350 (1906). This consequence followed because real estate companies and railroads frequently stood ready to advance the commutation price to the homesteaders in return for a promise to sell the land to the company. Id. at 351.

76. See, e.g., U.S. Housing Act of 1937, § 8, 42 U.S.C. § 1437f(a) (1976).

The prisoner's dilemma rationale is less clearly applicable to natural resource leases, but it may be valid in particular cases. Latecomers may have lower costs than early entrants because those who first develop the resource bear costs that must be shared with later developers. Roads must be built to extract timber from inaccessible areas, and oil exploration by one firm in one area may provide information to owners or leaseholders of neighboring areas. In such situations, due diligence clauses can overcome the incentive to hold back and let others move first.

3. *Poor Information and Paternalism.* — Following Charles Reich, many commentators view government transfer programs as creating a kind of "new property."[78] If so, the new property rights are often conditionally coercive. In general, people cannot sell or give away their benefits to others, and for some benefits, such as public housing, people forfeit their claim to a service by not using it. Even the right to receive straight cash grants through a welfare program with no restrictions on use is not a pure property right. An eligible person can give the payments she receives to anyone but cannot transfer the right to receive these payments. In-kind programs providing such benefits as housing, food, or day care also frequently restrict both the use and transferability of the benefit itself. Such coercion is justified as a way of overcoming the market failure caused by poor information and shopping opportunities,[79] or from a paternalistic concern for poor children and their families.[80] Social benefit programs can induce people to consume food, housing, health care, or education by making these services relatively inexpensive and prohibiting transfers.

A similar argument can be used to justify the Homesteading Acts. Those who wished to encourage the development of western lands could well have believed that homesteaders, if left to themselves, would

77. See Department of Housing Preservation and Development, The City of New York, Urban Homesteading, Request for Proposals, Dec. 9, 1983, at 4 (unpublished) (copy on file at the offices of the Columbia Law Review).

78. See Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245 (1965); Reich, The New Property, 73 Yale L.J. 733 (1964).

79. Barlow v. Collins, 397 U.S. 159 (1970), illustrates a situation in which program beneficiaries themselves argued for restrictions on the transferability of their entitlements. Petitioners were tenant farmers eligible for payments under the upland cotton programs. The law permitted them to assign their payments only "to finance making a crop." Id. at 160. In 1966 the definition of this phrase was changed to permit tenants to use advances to pay land rent. Tenants argued that this apparent increase in flexibility actually reduced their benefits under the program because landlords were now able to insist on assignments as a condition for obtaining a lease to work the land. Id. at 163.

80. See generally Rose-Ackerman, Social Services and the Market, 83 Colum. L. Rev. 1405 (1983) (discussing the rationales for in-kind programs).

have had an inefficiently short time horizon. Conditional coercion encouraged homesteaders to endure the hard initial years by subsidizing fixed costs in a way that gave them an incentive to remain on the land. Eventually, their skills improved, and the risks of farming fell. Here, too, the efficiency rationale based on imperfect information merges into a kind of paternalism.

4. *Distribution to the "Worthy."* — Suppose that for some reason the free market allocation of a scarce public benefit is unacceptable. Assume further that the number of qualified individuals using some clear standard such as income, employment status, or family composition exceeds the supply available. Thus, program administrators face a distributive problem that may be solved in a number of ways, including first-come-first-serve queues, the approval of applications, under-the-table payoffs, or a lottery. Alternatively, restrictions may be imposed that are less onerous for those who most deserve to receive the benefit. If determining worthiness through tests and application approval is costly and unreliable, the restrictions are a substitute sorting device. Such requirements may be particularly desirable if they also serve a productive purpose, as did the rural and urban homesteading laws.

Consider first the Homesteading Acts. Central to the homesteading program was the idea that a newly available resource (e.g., western land suitable for farming) should not go to those who already had capital but to those without other wealth.[81] This, however, was only an argument for giving the land to the poor in the first instance, not for requiring them to work on the property. To justify coercive conditions and restrictions on transfer we must add a second factor: in practice, the number of valuable sites was less than the number of landless people so long as the state took into account both the scale economies of production and the transaction costs of assembling a farm from a multitude of small entitlements. Thus, there needed to be some method to assign sites other than willingness to pay since market sales could defeat the redistributive purpose. In this context, homesteading emerges as a plausible choice. It is a more efficient allocation mechanism than a first-come-first-served queue since the time expended is not wasted waiting in line but is used in productive activities. Seen in this light, a conditionally coercive rule can use willingness to work to determine

81. See, e.g., Seymour v. Sanders, 21 F. Cas. 1133, 1135 (C.C.D. Minn. 1874) (No. 12,690) ("A leading object of the enactment was to benefit the poor man who was unable to buy the lands at government prices and receive his title at once and without conditions."), reprinted in J. Lewis, Leading Cases on the Public Land Laws of the United States 219 (1879). Nonetheless, homesteading accounted for, at most, "less than a sixth of the new homes and a little over a sixth of the acreage" in the United States between 1860 and 1900. F. Shannon, supra note 74, at 51. Gates refers to the mixture of sales and homesteading in the western states as an "incongruous land system." P. Gates, supra note 71, at 435. Although Shannon argues that the Acts had little redistributive impact, Gates points out the Act's role in limiting absentee ownership of large tracts.

who among the poor can best develop the resource. Of course, this policy also means that the very poor with no farming skills do not benefit from the program. It represents a compromise between accomplishing redistributive goals and assuring the efficient development of resources.

A similar rationale underlies many social welfare programs. When the number of needy people exceeds the supply of subsidized goods, it seems prudent to ration the scarce supply only to those people who will actually use the in-kind benefit themselves. Selling subsidized apartments to the highest bidders would undermine the redistributive purposes of the program. Since the price is not set to clear the market, demand will exceed supply even when transferability is restricted. Therefore, costly conditions may be added, such as willingness to perform maintenance chores in the building or to spend time fixing up the premises. The analogy to the Homesteading Acts is particularly close for redistributive programs that also have economic development or growth as a secondary goal. The restrictions on use and transferability in these programs can both accomplish redistributive objectives when demand exceeds supply at the subsidized price and encourage neighborhood preservation in much the same way as the Homesteading Acts induced people to endure the hardships of farming on the frontier.

Once again, however, this mix of efficiency and distributive rationales cannot be extended indefinitely. For example, it cannot be used to justify the coercive conditions in federal mineral leasing programs. Most leases are sold to high bidders, not given to those deemed especially worthy independent of their willingness to pay. Noncompetitive leases that are given to the "first" qualified applicant have distributive consequences, but not ones that make sense on normative grounds.[82] Furthermore, given the specialized skills needed to exploit mineral resources, it seems unlikely that these programs should be designed to serve a redistributive purpose.

III. Inalienability and Citizenship

The analysis of inalienability helps to illuminate a theme that has preoccupied students of capitalist democracy: How insulated should the state be from market pressures?[83] This Part discusses one aspect of the broader problem: When should rights be transferable and when

82. 26 U.S.C. § 226(c) (1982); 43 C.F.R. §§ 3111.1–.7 (1984). Council on Economic Priorities, supra note 68, at 22–23, describes the allocation of coal leases prior to the 1976 law. Of 242 lease offerings during the period 1921–1973, 10% drew no formal bidders and so were awarded at low rates to the original applicant for the sale. In 59% of the competitive sales only two bidders participated. The average bid was $3.31 per acre. The Council on Economic Priorities claimed that the prices paid, even when rent and royalty payments are considered, were far below the discounted present value of the mineral resources. Id. at 27–28.

83. See, e.g., G. Brennan & J. Buchanan, The Power to Tax: Analytical Founda-

must they be exercised by all who possess them? Should people be able to contract out of duties, and should duties be imposed even if the required services could be purchased in a market? My aim here is not to provide a comprehensive answer to these questions. Instead, it is to show how any answer requires us to confront the complexity of the idea of citizenship. To make the analysis concrete, I will show how alternative conceptions of citizenship have different implications for voting, military service, and jury selection. The analysis concentrates on the difference between rights and duties and between alienability and inalienablity.

A. *Alienable and Inalienable Rights*

Under the weakest conception of citizen responsibility, citizenship services are obtained under a regime of alienable property rights. Votes can be sold, given away, or left unused. Both soldiers and jurors are obtained in the regular labor market by offering compensation to people willing to participate. Qualifications may be imposed on both soldiers and jurors to assure a supply of good soldiers and qualified fact finders, but within these groups, market forces operate. This system minimizes the difference between the government and the economy. The impact of economic pressures can be attenuated, however, by moving to a system of inalienable rights.

1. *Votes.* — When voting is an alienable right, everyone meeting statutory requirements of age and citizenship would be entitled to one free voting right from the government, but people could then sell or give their votes to others. The affirmative case for alienability is derived from research on voting behavior which reveals that many voters are poorly informed and apathetic.[84] Similar conditions, after all, apply to voting rights in corporations. Although owners may not sell their proxies,[85] they may give their votes to management or to anyone else

tions of a Fiscal Constitution (1980); C. Lindblom, Politics and Markets (1977); S. Rose-Ackerman, Corruption: A Study in Political Economy (1978).

84. See W. Miller, A. Miller & E. Schneider, American National Election Studies Data Sourcebook 1952–1978 (1980) [hereinafter cited as Data Sourcebook].

85. Of course proxies *can* be sold if the shares of stock to which they are attached are sold as well. Manne, Some Theoretical Aspects of Share Voting, 64 Colum. L. Rev. 1427 (1964). Robert Clark has argued that sales of votes should be permitted, especially in fights for corporate control. See Clark, Vote Buying and Corporate Law, 29 Case W. Res. L. Rev. 776, 790–801 (1979). Frank Easterbrook and Daniel Fischel contend that this argument neglects the agency costs of separating voting from ownership. Easterbrook & Fischel, Voting in Corporate Law, 26 J.L. & Econ. 395, 410–11 (1983).

While the sale of proxies is illegal under New York law, N.Y. Bus. Corp. Law § 609(e) (McKinney 1963), no federal statute forbids such conduct. See Clark, supra, at 777 n.9. Furthermore, gifts of proxies can generally be revoked at will. 5 W. Fletcher & O. Smith, Fletcher Cyclopedia of the Law of Private Corporations § 2062, at 256 (rev. perm. ed. 1976). Proxies can be irrevocably transferred to others if coupled "with an interest." Id. A creditor, for example, may demand the right to vote some portion of a company's stock in return for extending funds. Id. at 20–21 (Cum. Supp. 1984). Since this scheme approximates the sale of a proxy, it has caused some confusion in the courts, id. § 2052, at 209 n.5, and is apparently a rather uncommon method of creditor control.

who offers to act as the shareholders' proxies.[86] Scholars have justifie this delegation of voting power on the ground that stockholders ha little incentive to become well informed about firms' policies.[87] What wrong, then, with extending this analogy to the state?

I do not want to go so far as to advocate vote selling in politic life. Vote selling is widely recognized to be inconsistent with egalit rian, democratic principles because it biases political decisions in favo of the wealthy.[88] However, in a direct democracy in which choices ar made by unanimous consent, the buying of votes does assure choice that benefit all citizens given the existing distribution of resources.[8 This can only be a desirable outcome, however, if the existing distribu tion is believed to be fair.[90] And even this limited defense of vote sell ing does not survive the move to a representative system making choices by majority rule.[91]

The current prohibition against donations cannot, however, be so easily dismissed. Since voters who pull party levers or follow the endorsements of *The New York Times* are de facto donating their votes, why not permit more formal assignments which, like corporate proxies, can be revoked at any time before the election? In spite of a generally held belief that people should use their own independent judgment in deciding how to vote, we do not impose any tests on the electorate to determine their level of knowledge of candidates and issues. We are torn, then, between two alternative views of democracy. Even when alienability through the market is outlawed, this conflict within democractic theory remains. On the one hand, there is the belief that voting is an individual, private act that should not be examined too closely by the state. On the other hand, the value of a representative democracy depends upon citizens making responsible, well-informed choices. This conflict is illuminated, but not resolved, by trying to determine whether voting rights should be governed by a modified inalienablity rule.

86. Because of the possibilities for abuse by management, the SEC regulates proxy solicitations. Regulations promulgated under the Securities and Exchange Act of 1934 prohibit fraud, permit shareholders to solicit proxies and to include certain of their proposals in the proxy statement, and require disclosure from opposition groups in proxy contests. See 17 C.F.R. § 240.14a (1984). State regulation of proxy solicitations, however, is practically nonexistent. See Eisenberg, Access to the Corporate Proxy Machinery, 83 Harv. L. Rev. 1489 (1970).

87. See, e.g., Clark, supra note 85, at 779–84.

88. For example, even staunch defenders of the market accept this argument. See J. Buchanan & G. Tullock, The Calculus of Consent 270–76 (1962).

89. Id. at 276–77.

90. For a recent critique of Buchanan's position in favor of the status quo distribution, see Rose-Ackerman, A New Political Economy?, 80 Mich. L. Rev. 872 (1982).

91. J. Buchanan & G. Tullock, supra note 88, at 270–76.

2. *Soldiers and Jurors.* — Despite the consensus against the sale of votes, there is no widely held belief that government should be isolated from economic forces. Public agencies commonly pay market prices for capital and other inputs. More controversially, the military's entrance into the labor market to obtain soldiers reflects current American practice and has been widely advocated by economic analysts.[92] An all-volunteer military requires the government to take into account the opportunity cost of personnel.[93] The armed services decide what sort of people they wish to recruit, but the people who actually decide to serve are those who believe that military service, given existing pay and benefit levels, is at least as good as their best private sector option. Unlike a draft with a fixed pay scale, the volunteer army makes taxpayers pay the social costs of military personnel,[94] shifting this citizenship responsiblity from the young to the general public.

Some commentators, however, object to this shift of responsibility on citizenship grounds. They claim that choosing soldiers who prefer military service to their opportunities in civilian life is undesirable in a democracy. Two kinds of people can be expected to volunteer: those with relatively low paying, unattractive job prospects in the private sector and those who like fighting and prefer military service over civilian jobs that pay as well or better. The army's personnel budget reflects the opportunity cost of recruits on the margin, but such an army may have long-term consequences for the stability of the society. The country may be overly likely to engage in militaristic adventures if its soldiers are people who like fighting more than the rest of us.[95] Alternatively, the potential for violent confrontations between rich and poor may be increased if the armed forces are composed of unskilled people who learn little beyond the use of weapons during their years in uniform.[96]

92. See, e.g., Amacher, Miller, Pauly, Tollison & Willett, The Economics of the Military Draft, *in* The Military Draft 347 (M. Anderson ed. 1982) [hereinafter cited as Amacher, Military Draft].

93. Id. at 366–75.

94. Of course, so long as wages are set to attract enough recruits and so long as some people would have volunteered at lower pay levels, some soldiers are earning a surplus over their opportunity wages, and payrolls overstate the economic cost of a volunteer army.

95. See Janovitz, The Logic of National Service, *in* The Military Draft 403, 431 (M. Anderson ed. 1982) ("If the armed services—through some sort of nationwide draft—are continuously faced with the task of absorbing recruits to whom the military way of life is basically uncongenial, or even repellent, there is a useful check on the development of a highly differentiated counter-civilian ethos."). Similarly, McNeill criticizes a draft that exempts college students. He argues that "the existing policy of exempting the future leaders of civilian life from military service positively invites divergence of viewpoint and seems almost suicidal in a democracy. . . . [I]t is precisely those who go to college and are headed for the privileged places in our society who should be drafted." McNeill, The Draft in the Light of History, *in* The Military Draft 59, 64–65 (M. Anderson ed. 1982).

Analysts have seldom viewed jury duty, unlike military service, as a job like any other that should be made available to qualified applicants. Yet it is difficult to see why a sharp distinction should be made between soldiers and jurors. Using the market to obtain jurors would make the public at large rather than randomly selected individuals bear the cost of jury service[97] and is consistent with an economic analysis that emphasizes the possible trade-off between the opportunity cost of jurors' time and their factfinding ability.[98] The objections, however, parallel those made for the draft. First, jury duty is seen by many as a duty of citizenship that people should not be able to opt out of because of better private opportunities elsewhere. Second, the process itself might be undermined if juries were staffed entirely by volunteers. Within demographic categories, the jury would be unrepresentative because those with high opportunity wages would not serve. This bias might destroy the jury's representative character.[99]

For military and jury service, using the market would imply that these activities are rights rather than duties. However, unlike voting, the distinction between inalienability and alienability is not central. People have a right to serve *if* the government finds them qualified, and no one will serve who does not find the terms of employment desirable. Like most private employment relationships, however, these jobs cannot be sold by the incumbent. As we shall see below, the distinction between alienability and inalienability only becomes salient when these activities are duties assigned by the state.

96. See Amacher, Military Draft, supra note 92, at 377–78 (examining the argument that a volunteer army will be disproportionately composed of blacks and members of other disadvantaged minority groups).

97. At present, pay is far below opportunity costs for most people. In New York State, jurors are paid not more than $12 per day plus food and travel expenses and $1.50 for each evening session. Extra compensation is permitted for trials lasting more than 30 days. Furthermore, although employers cannot discharge or penalize employees for serving on juries, they need not pay them for days missed. N.Y. Jud. Law §§ 519, 521 (McKinney Supp. 1984).

98. Klevorick, Jury Composition: An Economic Approach, *in* The Interaction of Economics and the Law 81–99 (B. Siegan ed. 1977).

99. This argument, of course, assumes that representativeness is desirable. The case for this position is made in two very different ways. On one hand, G. Calabresi & P. Bobbitt, supra note 37, at 57–64, argue that juries can be used to make tragic choices that strain the fabric of society. On the other hand, some observers believe that a representative jury will produce more accurate decisions, especially when "reasonableness" or "community standards" are at issue. See, e.g., Weiner, The Civil Jury Trial and the Law-Fact Distinction, 54 Calif. L. Rev. 1867, 1876–94 (1966). For evidence on juror behavior, see H. Kalven, Jr. & H. Zeisel, The American Jury (1966); Severance & Loftus, Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions, 17 L. & Soc'y Rev. 153 (1982).

B. *Inalienable and Alienable Duties*

Under the strong concept of inalienable duties, the state requires certain actions of some or all citizens and forbids the transfer of these duties to others. Every eligible citizen must vote; the military uses a draft or has a universal service requirement; and jury duty is an obligation of those called to serve. The coercive nature of the duties of citizenship can be reduced by making them alienable. Thus, for example, persons drafted into the armed forces could be permitted either to purchase substitutes or locate others willing to take their places.

1. *Votes.* — Consider voting first. In some democratic countries, such as Australia, voting is not only inalienable but also required. The law is enforced by imposing a fine on those who fail to come to the polling place.[100] Thus, in practice, the state has set a price for not voting. People with a very high opportunity cost of time may decide not to go to the polls. A relatively low fine, however, should be sufficient to assure a large turnout.

What can be said for such coercion in the name of citizenship? One argument is based on the free rider problems that arise in politics. Although the cost of voting is usually small, the chance of being decisive, even in a small town, is almost nonexistent.[101] When the law does not require voting, as in the United States, turnout is far less than one hundred percent even in important national elections[102] and may well be under twenty-five percent for relatively unimportant offices or in elections with little at stake. So long as indifference can be recorded, making voting an inalienable duty assures that all eligible citizens' preferences are taken into account and might seem to produce a more legitimate democratic result.[103] However, if many people are lazy or bored by politics, and have only vague preferences, they may not bother to vote without coercion and if coerced might well vote randomly or on the basis of whim and prejudice. Even permitting voters to register their indifference would not solve this problem since the truly apathetic might still vote randomly. They would have no more incentive to record their apathy than to cast a ballot for one of the candidates. The problem for them is not that they realize that one vote is unlikely to affect the outcome, but that they simply do not care which candidate is chosen. Therefore, avoiding coercion may be a better way to preserve democratic values than making voting an inalienable duty. When voting is an inalienable right whose exercise is slightly costly because of the time and trouble of going to the polls, the people who do cast ballots must feel that they have an obligation to do so in spite of their lack

100. See H. Emy, The Politics of Australian Democracy: Fundamentals in Dispute 596–97 (2d ed. 1978).

101. See B. Barry, Sociologists, Economists and Democracy 13–23 (1970).

102. See Data Sourcebook, supra note 84, at 303–28.

103. See Miller, A Program for Direct and Proxy Voting in the Legislative Process, 7 Pub. Choice 107 (1969).

of marginal impact.[104] As a consequence, they will be more likely find out about the candidates than the citizenry as a whole.[105]

The alternative of treating voting as an alienable duty does n have much to recommend it. It would permit the apathetic and tl undecided to delegate their choices to someone else by sale or gift. has all the problems outlined above for alienable rights, exaggerated b the fact that votes either must be used or transferred. Under both in: lienable rights and alienable duties, less than one hundred percent (the eligible voters cast ballots, but the former policy limits the influenc of the politically aware to their own vote and does not give those wh are wealthy an undue advantage. Of course, as any student of politic knows, making voting an inalienable right does not eliminate the im pact of wealth on electoral outcomes, but it seems to be a minima condition.

2. *Soldiers and Jurors.* — The arguments for forced jury duty anc military service are somewhat different. Unlike voting, all qualifiec people are not called upon to serve at a single point in time. There fore, the state must decide who should serve. If military service anc jury duty are seen as duties of citizenship, rather than jobs much like any other, a draft based on a lottery with no buyout possibilities seems to impose that duty most fairly. However, it is clearly more costly for society as a whole since some people with high opportunity wages in the private sector or little aptitude for soldiering or fact finding will be called. This cost will be borne either by the draftee, if wages are not tied to opportunity costs, or by the taxpayers, if they are. The country's labor resources are being used inefficiently, but in a way that treats the risks of military service and the inconvenience of jury duty as duties of citizenship that every qualified person must be willing to accept.

Suppose, however, that these duties are imposed fairly but are made alienable. In other words, people are assigned duties by the state but can induce others to perform them either for a fee or from altruistic motives. Thus, people are drafted or called to jury duty but may purchase substitutes or try to induce their friends or relatives to serve in their place. Such a system of alienable duties appears to have little to recommend it. Instead of striking a balance between competing values, it reduces *both* the fairness and the efficiency of the system.

To see this, consider a situation in which military service was an alienable duty. During the United States Civil War a compromise was sought between the inefficiency of a draft and its appeal as a fair way of imposing a duty of citizenship. In both the North and the South draftees could either buy their way out or buy a substitute.[106] The system

104. Benn, The Problematic Rationality of Political Participation, *in* Philosophy, Politics and Society (P. Laslett & J. Fishkin eds. 1979).

105. See Shubik, On Homo Politicus and the Instant Referendum, 9 Pub. Choice 79 (1970).

106. See E. Murdock, Patriotism Limited: 1862–1865: The Civil War Draft and the

amounted to a volunteer army financed by wealthy draftees instead of taxpayers as a whole. While soldiers may have ended up being paid the opportunity cost of enlistment, the government in planning its military activity was not required to take these opportunity costs into account. Therefore, it had an incentive to use too much manpower. Most criticism, however, attacked the unfairness of the system that (like the volunteer army today) permitted the wealthy to avoid service. In fact, the system quickly broke down in the North as localities and states first passed laws appropriating money to enable everyone to buy his way out and then began to pay bounties to enlistees.[107] In the South the purchase of substitutes was heavily criticized and was abolished soon after it was begun.[108]

If we rule out the option of alienable duties, then we are left with a choice between a market-based system under which military and jury service are rights that are voluntarily accepted, and a system of inalienable duties. Each alternative has something to recommend it, and a mixed strategy may be desirable. Thus, a volunteer army could be advisable in peacetime when military jobs are no more dangerous than many other forms of employment, but might be replaced by a draft based on a lottery in wartime. Jurors in cases requiring expert knowledge and the commitment of substantial time and energy might be chosen by paying qualified volunteers a high enough wage to clear the market. In situations in which a cross section of the population is required, jury service could be made an inalienable duty with pay levels set approximately equal to the average wage.

IV. Conclusions

The classification of entitlements developed here encompasses a broad range of property relations and analyzes rationales that incorporate and go beyond exclusively economic arguments. The economic rationales themselves are wide ranging and include problems of imperfect information and foresight, as well as administrative costs and externalities. Nonetheless, I have also attempted to incorporate distributive arguments and to point out how alternative conceptions of citizenship affect the analysis of entitlement rules. My aim is not to justify all existing restrictions, but to isolate plausible rationales for some.

We have seen how restrictions on the transferability, ownership,

Bounty System (1967); J. Randall, Constitutional Problems Under Lincoln (rev. ed. 1963). For a relatively favorable view of this practice, see Wittman, supra note 19, at 78.

107. E. Murdock, supra note 106; J. Randall, supra note 106.

108. A. Moore, Conscription and Conflict in the Confederacy (1924). According to Moore, substitution was originally supported in the South as a way "to reserve skill and talent for service in essential industries." Id. at 27. Criticism mounted when it was found that many who sought substitutes were not only wealthy but became war profiteers. Id. at 27–29. The market price of a substitute increased from $1500 to $6000 near the end of 1863. Id. at 29–30.

and use of property can be justified under a range of different assumptions about the structure of the world and the cost of alternatives. have also tried to show the limited applicability of some kinds of inalienability rules. Easy generalizations are frequently invalid. While an argument can be made for relying on blood donations, it cannot be generalized to products like used cars, even though they share similar informational characteristics. Shareholders, but not citizens, can give away their votes. Federal homesteading laws and federal mineral leases may appear similar in form but have very different rationales. The sale of both blood and "old" eagles might be permitted if certain institutional arrangements are not too costly to establish.

Inalienability is frequently justified not as an ideal policy but as a second-best response to the messiness and complexity of the world. It is generally possible to conceive of an alternative policy that would be superior if transaction costs were lower. The major exception involves the ideal of citizenship, where insulation from market forces may be desirable in principle and the main issue is whether to rely on voluntary donations or on coercion to achieve public goals. Thus, even in a first-best world without transaction costs, few people would advocate selling political votes. In contrast, if the argument against the sale of blood rests primarily on quality control grounds, a cheap and effective test for contamination would undermine the argument. This reliance on imperfect information and transaction costs to justify inalienability rules should not be seen as a weakness of the analysis, however. Instead, it is a way to rescue the concept of inalienability from its simplistic rejection by market-oriented economists or its overly enthusiastic embrace by paternalistic moralists.

WHY RESTRAIN ALIENATION?

*Richard A. Epstein**

INTRODUCTION

In her informative article, *Inalienability and the Theory of Property Rights*,[1] Susan Rose-Ackerman raises anew one persistent question that has worked itself into the fabric of our general law: Why should there be any restraints on the alienation of property? As stated the question is an extremely broad one. The right of alienation, as part of the bundle of property rights, is set in opposition to the rights of possession and use. The types of property to which it can extend are real and personal, tangible and intangible. Each type of property may be alienated in a number of different ways, such as by sale, hire, mortgage, lease, bail, or pledge. These various forms of alienation in turn may be restrained in many ways. The restraints may be whole or partial; they may be by common law rule or by public regulation; alienation may be subject to an absolute prohibition, or it may be exercisable only upon the payment of money.

As the possible range of restraints on alienation is very broad, it is important to order the inquiry so as to exhibit its essential features. This Article first seeks to explain why the right of alienation is a normal incident of private ownership. Thereafter it seeks to examine the principled reasons for limiting the right. These justifications in turn fall into two main groups. The first set is concerned with the practical control of externalities. These may take the form of aggression against third parties, the overexploitation of the common pool, or the exploitation of infants and insane persons. Alternatively, restraints on alienation may be used to redress some asserted distributional weakness within the present allocation of rights. My central thesis is that the first justification is sound, but that the second is not. The proper office for restraints on alienation is to provide indirect control over external harms when direct means of control are ineffective to the task.

In working through this analysis I start from the assumption that the core function of the law is to protect all persons and their property against the force and fraud of another. There is no doubt in my view that this simple view of entitlements between persons lies at the heart of most of our legal system, both as it developed at common law, and as it has come to be modified by statute. It is simply inconceivable to account for the durable features of our legal system without reckoning on the protections it affords against murder, rape, theft, fraud, and exploitation of minors and incompetents.

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1. Rose-Ackerman, Inalienability and the Theory of Property Rights, 85 Colum. L. Rev. 931 (1985).

Yet today this system of rights is under attack from a number of different quarters, chiefly by those who believe that all individuals have (as against their fellow citizens) the right to some minimum level of satisfaction for basic wants, determined by some collective means.[2] I believe that this alternative conception of rights is in error, but shall not pursue the point here, except to note that no system of welfare rights broadly defined seeks to jettison in its entirety the ordinary system of common law rights.[3] The analysis of restraint of alienation that follows is therefore not intended to resolve the tension between the two competing visions of entitlements, but only to explain how restraints of alienation make sense within the common law framework. The importance of the analysis for defenders of the primacy of common law rights is evident. Yet the inquiry also has vital importance for those who believe in minimum welfare rights as well, so long as these are conceived of as a supplement and not a replacement for the traditional common law conceptions.

I. WHY PERMIT ALIENATION?

As a first approximation it appears that any restraint upon the power of an owner to alienate his own property should be regarded as impermissible. The conclusion seems to follow from either of the two theories that have dominated modern thinking about property—individual freedom and social utility—assuming that we can distinguish clearly between them. To the person who thinks of rights as being acquired by first possession, the right of alienation seems to be an inescapable element of the original bundle of property rights. If alienation is not acquired by the person who has obtained ownership by taking possession of the property, then who else can claim it, and by what possible warrant? The right cannot simply vest in the state by ipse dixit,[4] and no other person has a claim that is equal to or better than that of the party in possession. To envision a system where *A* may possess and use property while only *B* has the right to alienate it is to embed a complex network of bilateral monopolies in the original distribution of property rights. As a routine matter costly negotiations between *A* and *B* must precede the sale to *C*, who may in turn be unable

2. See, e.g., J. Rawls, A Theory of Justice (1971); C. Wellman, Welfare Rights (1982); McCloskey, Rights, 15 Phil. Q. 115 (1965).

3. See Epstein, The Uncertain Quest for Welfare Rights, B.Y.U. L. Rev. (forthcoming 1985).

4. I explore this theme in greater detail in R. Epstein, Takings: Private Property Under the Power of Eminent Domain 12–13 (forthcoming 1985); Epstein, Possession as the Root of Title, 13 Ga. L. Rev. 1221 (1979).

to dispose of the property further if his own rights of alienation are also qualified.

This labyrinth of rights is both unnecessary and undesirable. Most voluntary transactions move property from lower to higher value uses. The purchase price is greater than the value of the property to the seller, else he will not part with it. Yet it must be less than the value of the property in use to the buyer, else he will not purchase it. When total transaction costs exceed the difference in values to the buyer and the seller, then the exchange cannot go forward, since both parties no longer will emerge as net winners.[5] The success in encouraging voluntary transactions therefore lies in the reduction of transaction costs. It follows that any gratuitous proliferation of the number of necessary parties to the transaction can only impede the frequency with which these transactions take place, creating in the long run substantial losses for the original owners. In addition, there are apt to be substantial losses to third parties as well. Voluntary exchanges work for the mutual benefit of both sides, and where these are restrained, potential purchasers share in the losses that are held by original owners.[6] To insure that exchanges can go forward, rights of alienation must be vested somewhere, or resources will remain fixed in the hands of those who do not want them. There seems no better place in which to locate exclusive rights of alienation than with the parties already entitled to possession and use.

Surely matters cannot be this simple, for everywhere throughout legal culture we find important restrictions upon the power of individuals to alienate their property or labor to third parties in voluntary transactions. Many of these restrictions, such as rent control[7] and price regulation of oil and gas,[8] to be sure, may be the undesirable outgrowth of interest group politics, which works to the disruption of what would otherwise be well-functioning competitive markets. Nonetheless, interest group politics does not supply the entire explanation for restraints on alienation. The normative case for these restraints occupies the rest of this Article.

5. More formally the relationship is as follows:

if $V_b - V_s > T_s + T_b$,

then a voluntary transaction can go forward. Here V_b is the value to the buyer, V_s is the value to the seller, and T_b and T_s are the transaction costs of the buyer and seller respectively. The purpose of most modern real property devices such as recording statutes is to reduce the transaction cost component in order to facilitate the exchange.

6. See, e.g., Holderness, A Legal Foundation for Exchange, 14 J. Legal Stud. 321, 322 (1985) (stressing the importance of "closed classes" to facilitate voluntary transactions).

7. See, e.g., Navarro, Rent Control in Cambridge, Mass., 78 Pub. Interest 83, 87–90 (1985).

8. Cf. Kitch, Regulation of the Field Market for Natural Gas by the Federal Power Commission, 11 J.L. & Econ. 243 (1968) (discussing the advent of formal price control regulation).

II. Controlling External Harms

A. *Prevention of the Improper Use of Force*

One assumption implicit in the case for free alienation is that the buyer's use of the property after alienation does not violate a rule of tort or criminal law. The demarcation between legal and illegal uses of property is a vexing problem for any legal theory. Nonetheless, for our purposes, it is sufficient to assume that they include the use of force against strangers. Once the class of permitted and prohibited uses is defined, the question then arises, what is the best way to police the use of property so as to bring about a world in which only permissible uses take place?

One obvious starting place involves the law of torts, which gives remedies in damages for harms that are committed, or imposes injunctions against the parties in possession to prevent these harms from occurring in the future. The choice between these two remedies is difficult. It depends in large part upon the anticipated gains from the actions in question, the likelihood that the defendants will have sufficient funds to pay damages, and the ability of injured parties to identify wrongdoers either before or after the harm in question takes place. The inquiry does not stop with tort law, as there is still the further question of how a system of direct regulation of use, either by fines or prohibitions, can replace or augment the system of tort remedies.[9]

The multiplication of possible remedial sets can easily stagger the mind, but keeping our eyes fixed firmly on the nature of the enterprise provides us with some guide through the empirical morass. The purpose of the inquiry is to determine the costs of error, both of over and underinclusion, brought on by the different remedial mixes directed to an accepted goal. At no point can one expect a foolproof solution, for so long as the costs of running a legal system are positive, some errors in its operation must be tolerated. Even if the best mixture of remedies is selected ex ante, a long shot may come home working injustice in the individual case. But unless the disaster alters the estimation of the relevant frequency and severity of loss, the proper institutional response is to do nothing at all. If, for example, the best system of dam regulation anticipates one major disaster in ten years, then its occurrence is not in itself a cause to change the applicable regulations. Rapid institutional shifts in response to immediate dangers hamper the operation of the regulatory system, much as making insurance rates turn solely on past experience precipitates enormous and unwarranted increases in rates after the occurrence of a single accident.

This uncertain inquiry into remedial choices works itself back into the question of alienability. Suppose, for example, it is concluded that

9. For a catalogue of the factors relevant to the inquiry, see Shavell, Liability for Harm Versus Regulation of Safety, 13 J. Legal Stud. 357 (1984).

no effective remedy is available against the party in possession of the thing because he is insolvent or difficult to locate, or both. Tort actions for damages or injunctions quickly become impossible or at least too costly. At this point the protection of third parties need no longer be confined to remedies directed against the party in possession. Protection of third parties could demand that dangerous instrumentalities never get into the hands of those persons whose conduct cannot effectively be policed or monitored. Legal restrictions on alienation thus allow an indirect attack upon improper use of dangerous things. Restraints on alienation may not be legitimate in most cases, but they will be legitimate in some. Identifying which restraints are legitimate raises the hardest questions confronting lawyers: How to make tradeoffs under conditions of radical uncertainty as to the causes of social disorder and as to the consequences of public intervention? A few illustrations show the nature of the problem.

1. *Gun Control.* — Gun control affords a useful initial example. Guns are an instrument of aggression, just as they are instruments of self-defense. The parties who have possession of them may not be able to answer in damages for the harms inflicted upon others, while injunctions upon their use are difficult to procure and almost impossible to enforce, whether by private or public action. The remedies against parties in possession are therefore weak. Accordingly, it may be that the best solution is to make sure that these guns do not get into private hands at all. To implement this proposal is to impose restraints upon alienation, that is, upon the sale of guns.

The case for these restraints is complicated because all guns, and all users of guns, are not alike. Note the relationship between three broad classes of weapons: machine guns, rifles, and handguns. The arguments in favor of restraint have proved decisive in the case of machine guns, which cannot be owned by private parties at all. The dangers of abuse are too great to tolerate, so that a prohibition on sale is properly added to direct restrictions on use. Yet the outright ban of machine guns need not necessarily extend to rifles in private possession. Rifles do not have the destructive capacity of machine guns, and they have legitimate uses, like hunting, for which there is no obvious safe substitute.

If the distinction between machine guns and rifles is sharp, that between between rifles and handguns is far more vexing. Rifles cannot be easily concealed and are thus less suitable for the commission of a crime than ordinary handguns. Yet even here the matter is clouded because at low cost they can be converted to handguns that are themselves often used for illegal purposes. If handguns therefore should be banned, then an argument could be made to ban rifles as well. But now the argument turns on empirical estimations of the private gains from using rifles, and of the cost of their conversion into handguns.

I do not know enough about handguns to determine whether they

should be banned, but this discussion illustrates why the debate has been so pointed and inconclusive.[10] The persistent question is whether the regulation can distinguish between proper and improper uses at some acceptable costs. Handguns have certain legitimate uses (e.g., target practice) that do not involve other persons. They can be used for self-defense as well as for aggression. Their desirability is far greater in certain areas, e.g., the western mountains, than in others, e.g., cities. Some persons need guns to do their work; others are better off without them because they are unfamiliar with their use. We could try a system that restricted their use to certain types of persons, e.g., policemen and security guards. Yet the system is apt to be porous, for guns are cheap and easily transferable to persons who should not have them. The system of direct controls upon use may simply be too inefficient to serve as the sole source of social control.

The simple inquiry expands from its center. At a minimum the legal system must ask who are the persons covered: all persons, all minors, all minors and persons with criminal records, all persons except those in designated professions (the security guards, again), all persons except those who qualify for licenses? Even after the class of users is identified, the question remains whether that regulation can be evaded by clandestinely importing guns from outside the jurisdiction, which leaves the law-abiding at a disadvantage against the well-armed criminal with less respect for the authority of the law.

If direct restraints on alienation are rejected, then the possible applications of tort law may be invoked as a partial substitute. The right of action against the user of the gun is sufficiently straightforward. The hard question is whether it is possible, when the assailant is penniless, to reach back against the party who sold it in the first instance, either under the rubric of products liability or even ultrahazardous activities. In general, a retailer who sells a gun to an infant may be held responsible for the injuries in question, typically on a theory of negligent entrustment. But there is great opposition to the idea of holding that a sale per se is tortious when the purchaser is an adult.[11]

The choice of sanctions is not easy, even if questions of politics and special interests are put to one side. So long as the restrictions on use are imperfect, restrictions upon alienation may make perfectly good

10. Compare N. Morris & G. Hawkins, The Honest Politician's Guide to Crime Control (1970) (advocating gun control), with Restricting Handguns: The Liberal Skeptics Speak Out (D. Kates ed. 1979) (opposing gun control) [hereinafter cited as Kates].

11. See, e.g., Martin v. Harrington & Richardson, Inc., 743 F.2d 1200 (7th Cir. 1984) (holding that sale of handguns is not an ultrahazardous activity under Illinois law); Linton v. Smith & Wesson, 127 Ill. App. 3d 676, 469 N.E.2d 339 (1984) (manufacturer of handgun has no duty to prevent its sale to persons likely to cause harm to the public). But see Richman v. Charter Arms Corp., 571 F. Supp. 192 (E.D. La. 1983) (denying summary judgement motion of handgun manufacturer who faced liability on an abnormally dangerous activity theory for a routince sale of a firearm).

sense, and cannot be ruled out of bounds by any per se pronouncement. The mix of sanctions against improper use and original sale is not conceptual, but empirical. And this empirical question is one on which it is almost impossible to acquire reliable and systematic evidence.

2. *Liquor.* — The framework of analysis extends beyond the gun cases. Drinking liquor may not harm anyone but the user. But the behavior that alcohol induces in drinkers may inflict serious harm upon third persons. Prohibition was a complex set of restraints upon the production, sale, and use of alcohol, where restrictions on both production and sale were designed to prevent such harm by limiting the amount of use. But the case for limiting freedom of action is far more persuasive when the protection of strangers (or even family) is at stake than it is when harms are self-inflicted. Thus, Prohibition's major weakness, especially as a constitutional norm, was that in preventing the sale and use of a product, which some people abused, prohibition also restricted the rights of many who enjoyed, but did not abuse, alcohol.[12] Its constitutional repeal did not occur because prohibitions on production, sale, and use failed to reduce the harms caused by liquor. Rather, the nation was not prepared to pay the price imposed by the enforcement of the comprehensive ban, including the sharp increase in criminal behavior.

The repeal of Prohibition, however, does not eliminate the problem of social control. Instead, it forces us to think about more modest systems of social control directed explicitly to third party harms such as drunken driving. One set of sanctions could be directed against the driver—for example, drivers can be frequently tested for drunkenness, and heavy penalties imposed on those who are found drunk, as is done in Scandinavian countries.[13] A second approach is to apply tort (after injury) or criminal sanctions (after arrest for reckless driving) to drunk drivers. Intermediate strategies may also be envisioned.

Yet, as with guns, there is no reason to direct public controls only to drivers who drink. Tort remedies might be levied against commercial purveyors who sell liquor to persons who drive while drunk, as the California Supreme Court attempted to do.[14] Similarly, the tort action

12. The comparison between gun control and prohibition has been made by the opponents of gun control. See Kates, Toward a History of Handgun Prohibition in the United States, *in* Kates, supra note 10, at 23–24.

13. Compare Ross, The Scandinavian Myth: The Effectiveness of Drinking-and-Driving Legislation in Sweden and Norway, 4 J. Legal Stud. 285 (1975) (questioning the effectiveness of these laws), with Votey, Scandinavian Drinking-Driving Control: Myth or Intuition, 11 J. Legal Stud. 93 (1982) (defending their effectiveness).

14. A string of California cases established the basic patterns of liability. See, e.g., Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971) (en banc) (implying a private civil remedy against a tavern keeper and in favor of an injured person from the California statute making it a misdemeanor to sell alcohol to an intoxicated person); Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976) (en banc) (extending *Vesely* liability to a Nevada tavern keeper who advertised in California and served alcohol to an intoxicated Californian, who drove back home and injured another Californian); Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978) (en banc) (extending liability to social hosts who serve intoxicated guests).

Cal. Bus. & Prof. Code § 25602(c) (West Supp. 1985) overrules these three cases by name, showing an evident respect (and dislike) for the interpretative ingenuity of the California Supreme Court. When the statute was attacked on state constitutional grounds, the court declined to make its own common law rules on causation a state constitutional requirement, despite its obvious misgivings about the merits of the statute. See Cory v. Shierloh, 29 Cal. 3d 430, 629 P.2d 8, 174 Cal. Rptr. 500 (1981) (noting and accepting the legislative overruling of *Vesely*, *Bernhard*, and *Coulter*).

may also be allowed against social hosts who know both that a guest is intoxicated and that he is about to drive.[15] These damage actions raise important questions about the basis of the defendant's liability, and the question of proximate cause: e.g., did the driver sober up?, did he obtain the liquor from several different sources? As an institutional matter, however, it is possible to introduce direct controls on the sale of liquor: no sale after 2 a.m., or to persons under eighteen, or to persons who are known to be intoxicated. Risks of third party harms are again controlled by restrictions on rights of alienation as well as rights of use.

3. *Narcotics and Drugs.* — The analysis can be extended to deal with a third case—narcotics and prescription drugs, many of which have illegal uses. There is always a danger, especially with narcotics, that persons under the influence will inflict harms on third parties, as when a gunman under the influence of heroin goes on a rampage. Considerable evidence also exists that a substantial number of automobile accidents are caused by persons who drive under the influence of drugs, although the empirical data is woefully inadequate.[16]

Drugs and narcotics are also a danger to persons of limited competence, e.g., to children and incompetents, who are especially likely to harm themselves by using them. That these people cannot protect themselves justifies their protection under the law from the seductions offered by strangers. One means of protection is to provide a guardian who has the exclusive power to contract on behalf of the ward. Nonetheless, wards are often able to form and perform agreements even when denied the legal rights to do so. It is quite impossible for parents to supervise their children's purchase of narcotics on the school playground. Since there is good reason to restrict their use, it may be appropriate to ban the sale of the substance to the protected class. But if resales of dangerous substances cannot be controlled, then restrictions on alienation to juveniles or incompetents may not suffice. Broader bans on the sale of certain substances may have to be considered notwithstanding the obvious risks of overbreadth. The simple program

15. See, e.g., Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984).

16. See Belkin, Studies Weigh Hazard of Legal Drugs and Driving, N.Y. Times, Dec. 22, 1984, at 30, col. 2 (noting lack of empirical studies).

of restraining sales to prevent improper use by minors and incompetents again leads to a myriad of institutional arrangements.

4. *Speech.* — The same problem can arise with the transfer of information by sale. Suppose that someone wants to sell a book that describes how to build an atomic bomb. Here it seems clear that the purchaser could be banned from building the bomb in question if he had the information. But it is often far more desirable to prevent the dissemination of information in the first place. Courts, for good reasons, are very reluctant to impose any restrictions upon the freedom of speech, given the possibilities of their abuse.[17] Yet in some cases, at least, a ban upon the sale of information becomes part of a comprehensive system for the control of the use of force.

B. *Common Pool Problems*

The second situation in which it often proves important to restrict the freedom of alienation arises with common pool resources, i.e., in those contexts in which one person is not the exclusive owner of a single resource, but shares it in indefinite proportions with other claimants. Whenever assets are held in common pools, there are dangers of overexploitation by each of its members. The root of the problem lies in the uneven match between benefits and burdens when something of value—say animals or oil—is removed from the common pool. The party who removes it receives all the gain from the removal, but only bears a small fraction of the cost. The social costs from any given removal may therefore be greater than the private gains of the removal, which are in turn greater than the private costs to the individual who removes it. That person responds only to his private costs, and hence creates an external loss to others. The great risk to the common pool is that every part owner has the strong incentive to remove something of value from the pool, so that if removal is done by all, the common pool may be destroyed, leaving every member worse off than he would have been if some restrictions upon individual removals had been imposed collectively.

The problem of the common pool does not have the obvious urgency of ordinary aggression. A society could function if common pools were left unregulated. Nonetheless the potential long-term effects can be extremely costly. The question therefore is how can one best regulate the risks associated with overexploitation of the pool. For that purpose, restraints on the right of alienation are one tool in the comprehensive system of controls, one which can augment direct restrictions upon use. To see why it is important to restrain alienation, it

17. See, e.g., New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam) (summarily rejecting Nixon Administration's attempt to enjoin the publication of the Pentagon Papers); Near v. Minnesota, 283 U.S. 697 (1931) (striking down a prior restraint law).

is instructive to note that common pool problems can arise in two different contexts. They may be created among strangers by customary practice or by operation of law, or they may be the outgrowth of a consensual arrangement. Three areas in which the problem arises are water rights, consensual limitations upon the assignment of contract and property rights, and the prohibitions on the sale of voting rights.

1. *Water Rights.* — Flowing water is a valuable resource for which there is no obvious single owner. Assuming, as was the case historically, that the Crown or the state does not own these rights by assertion alone, then there must be some natural mode of acquisition that matches claims to water with individual owners. One possibility is to use the rule of first possession that establishes ownership of wild animals.[18] But the consequences of this regime are simply unacceptable because it spells the end of a river qua river. Flowing water has value for navigation, for fishing, for recreation, for farming, and for irrigation. To resort to the bankruptcy expression, there is little appeal to a rule that would convert a river as a "going concern" into a stagnant pool.[19] In order to avoid this disastrous outcome, the first possession rules had to be adapted to water rights to prevent the destruction of the common pool.[20] The necessary restrictions are on use as well as alienation, and the overall design of the system only becomes clear when the connections between the two are made explicit. In order to exhibit the total rights structure, it is useful to organize the inquiry around two questions. Who is entitled to be a member of the common pool? What is the size and scope of each member's share?

The answer to the first question is straightforward. Under the common law regimes of natural flow and reasonable use, the water rights were in general allocated only to the owners of the riparian land, so that possession of the land carried with it rights to the water. By limiting the interests in the pool to riparians, the common law achieved a solution with several very desirable features. The riparian requirement made it very easy to determine who was a claimant to the pool and who was not. It also vested the rights in the waters in a class of persons who, by virtue of their proximity to the resource, were apt to value it most. To be sure, this riparian solution did not apply to every use of flowing water. With navigable rivers, for example, the public at large had a right of passage that no riparian could obstruct. Yet here

18. See, e.g., Pierson v. Post, 3 Cai. R. 175 (N.Y. 1805).

19. The use of the term and the analogy to bankruptcy is quite conscious. In bankruptcy, the objection to a liquidation of a business is that the parts may not fetch as much as the business is worth as a going concern. Deciding which firms to liquidate and which to reorganize is a very complex business. See generally Jackson, Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain, 91 Yale L.J. 857 (1982).

20. For a summary of the rules governing water rights, see C. Donahue, T. Kauper & P. Martin, Property 322–59 (2d ed. 1983).

too a simple rule determined who had rights and who did not: everyone might exercise the right of passage.

Once the members of the common pool are so determined, then the next question is: how much water is allocated to each of the many persons who have access to the pool? "It is a fair participation and a reasonable use by each that the law seeks to protect."[21] The formula has a certain vague generality that is bound to invite conflicts at the margin. But it also has a certain inner coherence that explains its durability. By stressing the idea of a "fair" participation, the law did not foreshadow any principle of equal wealth among riparians, much less echo some modern themes of income redistribution in society at large. The owner of an extensive river estate did not hold his interest at the whim of a struggling farmer, or vice versa. Instead, the idea of fair participation guaranteed that no single person could appropriate all the water in the river to his own use, thus destroying its going concern value. By so providing, the law necessarily made the river into a common pool asset owned by a group of individuals who did not stand in a consensual relationship one to another.

Nonetheless, administering a common pool asset is not resolved by the simple negative declaration that no single riparian owns the entire river. The question of shares remains. In a world in which direct administrative controls are not in the cards, only simple devices are available for the messy job of rationing. Under the natural flow systems, the tendency was to restrict use sharply, confining it largely to domestic purposes. In the American "reasonable use" version, the law created a rough hierarchy of permissible uses; domestic purposes first, agricultural second, and commercial third, was the traditional allocation.[22]

The priorities become critical in times of scarcity when the system must ration an amount of water that cannot satisfy all uses. Here the answer in natural flow systems was a pro rata reduction of use, which was uniform across individuals, given that they were all in a single class.[23] In the reasonable use states, the proration takes a somewhat more complicated form. Proration is first applied to the commercial uses, then the agricultural, and last the domestic. But within each class all users are equal. This system of proration requires supervision of all users simultaneously, and imposes potential administrative costs. But there is no viable alternative. Since all riparians obtain equal rights by virtue of their possession of adjacent land, priorities cannot be based upon the time when water rights were first acquired, as is done under the prior appropriation system dominant in the western part of the United States.

Proration under natural flow and reasonable use has been attacked

21. Dumont v. Kellogg, 29 Mich. 420, 423–24 (1874).

22. See, e.g., C. Donahue, T. Kauper & P. Martin, supra note 20, at 322–23.

23. See Restatement (Second) of Torts § 850A comment j (1979).

forcefully on economic grounds. The gist of the argument is that even restrictions on water uses need not entail reduction in reverse order of their value—that is, least valuable uses first. "Prorationing is an uneconomical principle of allocation, however common in many walks of life. Cut back everyone by 25 per cent and some will miss the marginal water very little, others a great deal."[24] But the objection is not decisive, for it is not enough to show that the system is necessarily inefficient or unsound, without taking into account the costs necessary to set things right. With water, the administrative costs in individualizing the cutbacks would be enormous and subject to obvious abuse, given the risks of rent-seeking that accompany any exercise of discretionary authority. The rule, therefore, like other simple rules of thumb, is largely dictated by the need to make decisions under conditions of imperfect information. The fine points of marginal costs and relative value are too hard to capture in the day-to-day world.

We are now in a position to establish the link between restrictions on use and those on alienation. Note the ambivalent response that all riparians should have toward alienation, given their own uncertainty as to future plans for use. In one sense it is desirable for each riparian to be able to sell water rights to those who will make better use of them, since the two parties to that sale will both be gainers. Better use for the buyer, however, may also be a more intensive use, which means that any sale of riparian rights may diminish the correlative rights of other claimants to the common pool. But there is another side to the coin. A complete ban upon alienation is unlikely to maximize the value of the pool, because persons who have little use for the water will continue to draw upon it so long as its value in use to them exceeds their (trivial) costs of removal.

The common law response to the problem steered between the two extremes.[25] Thus, the English natural flow system allowed the alienation of water rights but only when tied to the sale of the riparian lands. The landowner could not sell rights of access to the water to the many who wanted to water their animals at the riverside. He could, however, sell the land itself to a farmer able to make more intensive use of the riparian lands, who could then have access for his own cattle. In addition, under the older view of the law, the riparian could not expand the land serviced by the water rights by acquiring land adjacent to his own, for such a purchase would allow the owner unilaterally to increase the burden he placed upon the common resource. The same uneasiness carries over to the present day, but now the prohibition against the use of water on nonriparian land tends not to be absolute, at least in

24. Gaffney, Economic Aspects of Water Resource Policy, 28 Am. J. Econ & Soc'y 131, 138 (1969).

25. Although the reasonable use systems adopted in the eastern United States vary enormously, most of them impose some restraints upon the power of alienation. Frequently, these restraints are not as strict as those found under the English rules.

the United States.[26] The dominant view today seems to be that nonriparian uses may be allowed, even though they will be judged more closely than riparian ones, again doubtless because of the fear of surcharge against the common pool.

The differing responses to the questions of alienation and use illustrate the proposition that partial restrictions on alienation may help preserve the value of common pool resources while permitting tied sales that move resources to higher-valued uses. The common law systems were by no means perfect, but the same can also be said about the more modern administrative schemes that have replaced them.

2. *Consensual Restraints on Assignment of Contract Rights.* — Contracting affords the means for two or more parties to pool their separate resources into a common venture. One question that frequently arises is, who will be the parties to the venture after it is created? Here both sides often agree that the rights that they have created under contract shall not be assignable without the consent of the other. The reason for the agreement is the fear of a surcharge—of additional burdens—upon a promisor should the promisee assign the right to a third party. The promisee is a known quantity chosen and selected by the promisor. Even if the legal system gives the promisor the same rights against the promisee's assignee, the value of those rights still may be reduced by the assignment. The promisor may not have any informal leverage against the assignee, or the assignee may have a greater willingness to breach in the hope of getting some collateral gain. Preventing the assignment reduces the cost to the promisor by fixing the content of the obligation that would otherwise run to an unidentified party. Where the gains to the promisor exceed the costs to the promisee, this arrangement will be in the mutual interest of both parties. The other obligations of the promisor (e.g., the interest rate) can be adjusted to compensate the promisee for the loss of the right of alienation.

The contexts in which restraints on alienation make good business sense are many and varied. In some instances the parties stand in asymmetrical positions, as with a licensor and licensee of land. In other situations they stand in roughly parallel positions, as with various personal service partnerships, where neither side relishes the thought of suddenly being in business with a stranger. Where a small business assumes a corporate form, the same concern with the identity of one's business associates is expressed by limitations upon the right to alienate shares without the consent of others. Where the business deal becomes more complex, the restraint on alienation may be partial or conditional. Shares may be sold to family members, but not to outsiders; or they may be sold with the approval of the owners of sixty percent of the other shares.

26. See, e.g., Restatement (Second) of Torts § 855 (1965). Comment b notes that there is still authority to the contrary, and the fact that a use is nonriparian still counts against its permissibility.

In some cases, however, legal systems go further and treat certain rights over common assets as though they were incapable of alienation, without regard to contractual intent. Thus the Roman Law of usufruct—their rough analogue to the life estate—provided generally that the holder of the usufruct interest, the usufructary, could not alienate to a third party, but could release his interest back to the dominus, the owner of the property.[27] The reason for the distinction harkens back to the familiar risk of surcharge. Release of the usufruct to the dominus did not expose the common asset to a risk of overuse, for reuniting both interests in the original owner extinguished joint ownership and with it the common pool problem. Nor need voluntary transactions stop with the release, for the owner always could create a new usufruct in a third person of his own choosing. If the two transactions were viewed as part of a unified plan, then the Roman rules allowed (to use common law terms) the transfer of the life estate with the consent of the reversioner, who then could control the identity of the new entrant in order to reduce the likelihood of waste. In contrast, direct alienations between old and new usufructaries did create the risk that the owner would be prejudiced by a more intensive or destructive use by the new party in possession, against which actions for waste, brought after the fact, may have provided inadequate protection.

The problem was not unique to the Romans. It occurs whenever a tenant wants to sublet an apartment over the summer vacation. The landlord wants to protect his reversion against abuse by the new tenant in possession, and may only be imperfectly protected by the desire of the tenant to protect his short-term interest in the premises.

The distinction between release to the owner and a transfer to a third party has much to commend it. But it does not necessarily justify a flat prohibition against third party transfers. The usufructary and the owner were not strangers, and if they wished to arrange their transactions to allow the usufruct the free alienation of the ususfructary's limited interest, then why prevent them from doing so? In principle, the limitation on alienation imposed by the law might be presumptive only, subject to contrary language in the original instrument. Nonetheless, it is easy to underestimate the complexities of contracting out. One risk is that the original owner may predecease the usufructary who then must deal with a stranger to the original transaction. Another is that written evidence may have been hard to come by, especially in Roman times when lives were of uncertain length. The total prohibition may have been preferable to the contract solution because of the ease of its operation. Its resulting inflexibility was of relatively small moment,

27. See Gaius, Institutes, II, 30.

given the unlikelihood that the parties would choose to grant the usufructary free rights of alienation, even if allowed by law.

The same pattern emerges in the common law as well. The dominant English rule is that easements in gross are generally inalienable, so that any effort to create one results only in a license between the parties.[28] The fear is that the free transfer of the easement to a third party will impose a surcharge against the owner of the burdened land. Yet again there is some question whether the prohibition is necessary to protect the interest of the landowner; registration systems can give notice to the world of the state of the title,[29] while contractual provisions, which are cheaper to draft than in earlier times, may be able to control the risk of surcharge in the event of transfer. Thus, the case for restraining alienation in consensual situations has weakened in modern times.

3. *Voting Rights.* — The same analysis can be extended to the sale of voting rights, which is generally restricted or prohibited. The problem arises both in corporate and political contexts.

a. *Corporate Voting.* — Corporate charters often place consensual restrictions upon the alienation of shares. In addition, the sale of the voting rights apart from their underlying shares is usually prohibited by statute,[30] much as the common law prohibits the naked sale of riparian rights. Understanding these restrictions again depends upon the common pool problems that arise because assets have been placed into corporate formations. As in the water rights case, the key risk is that directors and officers of the corporation will divert corporate property to their private use, suffering only a portion of the corporate loss and reaping all the private gain. Other investors will not place money into the corporate solution if they know it can be removed under systematically unfavorable terms. To raise capital, then, the corporate organizers must protect new investors against the possibility of looting.[31] Indeed, much of the law of both public and private corporations is

28. See J. Dukeminier & J. Krier, Property 963 (1981). For an attack on the rule, see Sturley, Easements in Gross, 96 Law Q. Rev. 557 (1980).

29. See Epstein, Notice and Freedom of Contract in the Law of Servitudes, 55 S. Cal. L. Rev. 1353 (1982).

30. See, e.g., N.Y. Bus. Corp. Law § 609(e) (McKinney 1984). Professors Easterbrook and Fischel note: "There are a number of statutory limits on the ability of firms to create the voting structures they prefer. For example, although investors may sell their votes by selling the instruments to which the votes are attached, they may not sell the vote independent of the instrument." Easterbrook & Fischel, Voting in Corporate Law, 26 J.L. & Econ. 395, 400 (1983).

31. See id. at 410–11. The authors conduct a similar analysis by stressing the agency costs complications that are raised when shares have different voting rights. The point helps explain why public companies tend to have very simple capital structures, while private corporations, which can take into account differences in position, have more complex structures. Thus one common arrangement gives the older generation preferred shares and the incoming generation common shares, in an effort to match risk with control.

designed to counter that abuse, whether it manifests itself in the form of outright theft, or in subtle forms of favoritism for the control group.

One set of controls is directed towards the behavior of the parties in power. Contracts of incorporation normally will impose fiduciary duties upon the directors and officers of the corporation. They may be restricted from acts of self-dealing or be required to treat all shareholders in a nondiscriminatory fashion. Yet these rules cannot be drawn with sufficient precision to prevent key officers from being paid excessive salaries or from padding expenses. Nor are such restrictions necessarily desirable if they hinder the ability of directors and officers to enter into new businesses or to abandon unprofitable ones.

Since the direct remedies against abuses by officers and directors are imperfect, there are occasions where they may be usefully supplemented by restrictions upon the rights of alienation. Begin with the hypothetical case where the charter of incorporation allows votes to be sold independent of their underlying shares. Under this regime it will be difficult to value the shares without the votes and the votes without the shares. The value of the vote depends in large measure upon the question of whether one person has obtained sufficient votes to hold a veto or control position over corporate decisions. That position in turn could be exercised to permit the diversion of corporate assets to private use. Even if the seller of votes has confidence that his buyer will not misbehave, there is no guarantee that abuses will not occur after resale. Transactions in votes alone invite schemes that result in the redistribution of wealth, but not in wealth's production. Ex ante there is no obvious group favoring a solution that permits free alienation of votes without the underlying shares. The reason for the restriction of this practice by agreement seems clear. The prohibition by statute is far more debatable, yet this restraint has caused so little controversy precisely because it does not block any sensible voluntary transaction.

The situation becomes more complex when the question is whether to impose by agreement restraints on the alienation of *shares*. It is highly doubtful that people could be led to invest in public corporations if they did not have the right of exit. This compromise solution, that votes may be sold with shares, helps reduce the risk of the diversion of common pool assets, just as it does when the sale of water rights is tied to the sale of riparian lands. It now takes more capital to acquire the shares, and there is less apt to be the fatal mismatch between shares and voting rights that invites abuse. Efforts to prevent such a mismatch have led to a concern at common law with both voting trusts and irrevocable proxies, precisely because they tend to separate votes from shares.[32] This concern also lies behind the traditional rules of public

32. For example, proxies must be revocable unless coupled with an interest. See, e.g., N.Y. Bus. Corp. Law § 609 (McKinney 1984). Thus they may be revoked by the issuance of a later proxy. Voting trusts (a pooling arrangement whereby shares under separate ownership were voted by a trustee in accordance with prior instructions) were

exchanges that prohibit multiple classes of voting common stock.[33] Indeed, much of the concern with corporate raiders arises from the fear of corporate looting, although it seems probable that other safeguards against looting and abuse are powerful enough that efforts of management to prevent the sale, when not authorized by charter provision, should always be looked on with deep suspicion.[34]

Nonetheless, the balance of convenience may shift dramatically in private corporations, where the identity of the shareholders is often critical. The power to vote still influences the control of the corporation, which in turn influences the distribution of the gains and losses from the use of corporate assets. Yet the small number of relevant parties may make it easier to create a fatal shift in the desired balance of control. The restriction on the right of alienation thus can operate as the first line of defense against corporate abuse. With five equal and independent shareholders, for example, there is a clear risk in allowing any one shareholder to purchase the interests of two others. (To make the point more dramatic, assume that all shareholders obtained their interest by inheritance, so that there is no contract to govern their interpersonal relations.) Armed with sixty percent of the shares, this majority control would open additional opportunities for diversion of corporate assets.[35] To guard against this risk, it is often provided that the sale of shares must be made to the corporation, where the dominant effect is to insure that the sale does not distort the relative positions of the remaining equity holders in the firm. Yet even here the rule is far from perfect, because even the corporate buyback may suddenly promote one shareholder to a fifty percent controlling interest.

prohibited at common law, and when allowed by statutes are hedged in by limitations upon their duration that required periodic renewals of the trustee's powers. Easterbrook & Fischel, supra note 30, at 400.

33. The question of multiple class stocks arises with new urgency in the modern takeover battles where management seeks to use a second class of voting common to ward off hostile takeover bids. These shares are generally distributed to persons friendly to management and clearly diminish the worth of the outstanding shares of common. See, e.g., Unequal Rights in Voting Stock, N.Y. Times, Mar. 17, 1985, at D2, col. 1. Note that these new issues of special voting common would never take place if their distribution had to be made pro rata to all shareholders. Their skewed distribution is thus evidence of rent-seeking in the corporate context and its usual negative-sum consequence.

34. See, e.g., Easterbrook & Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161 (1981).

35. More formally the case is as follows. In a well-run corporation one tries to maximize the profits of the whole to maximize the profits for each shareholder. Yet if one shareholder has 60% of the stock, he can try to increase his effective share, so long as $(0.60 + x)(V^*) > 0.60V$, where V is the value of the firm when run efficiently and V^* its value as reduced by conflicts of interest. If x, the percentage gain to the majority, is very large it could pay for the majority to make V^* quite small. If that is the case then the minority shareholders take it on the chin both ways, as $(0.40 - x)V^* < 0.40V$, producing a net loss. The organizers of the corporation have an incentive to minimize this loss at the outset in order to attract investors.

The variations in the control patterns are many, especially when supermajorities are required to take certain kinds of corporate actions. Nonetheless, the corporate situation illustrates the central thesis that by common practice, restraints on alienation have been used as safeguards against the improper use of corporate control.

b. *Public Elections.* — The restraints on alienation found in the corporate context shed some light upon the well-nigh universal prohibition against the sale of votes in public elections. It is important to stress that a public office is indeed a public trust, so that elected officials, like corporate officials, have fiduciary duties. In addition, the Constitution contains certain explicit limitations on government power that are well understood as efforts to control the abuse of factions.[36] But these restrictions, even if properly construed, still leave room for patronage abuse, since public goods, from national defense to sewer repair, must be provided by private contracts. As with close corporations, there is no easy entry and exit from the jurisdiction. Accordingly, some steps must be taken to see that elections of public officials are not a prelude to ruinous taxation or the plundering of the public treasury.

The question, then, is how to constrain voting rights given that other controls against the abuse of public power are imperfect. The original tendency to limit voting rights to property holders was a response to the fear of confiscation if propertyless individuals should obtain control over the powers to tax and regulate. The analogy is that, just as only shareholders can vote in corporate elections, so only property holders were entitled to vote in political ones. The injustice in this restriction was, of course, that persons without property nonetheless had a stake in the community and were bound by its laws. Nonetheless, the concern to limit the franchise still finds voice today in durational residence requirements, just as only riparians have water rights. Small towns watch uneasily when relatively transient college students gain control over local institutions. (The problem with the Raj Neesh in Oregon, who has imported residents to his commune, is even more obvious.) The people who pay local taxes will not willingly cede power to outsiders, even though it is well understood that local decisions will have important external effects.

Eligibility requirements are only one restriction on the right to vote. The fear of confiscation and worse also underlies the continued prohibition upon the sale of votes. Why would one want to purchase a vote? The most probable answer is to obtain control of the public machinery in ways that allow a person to recover, at the very least, the

36. For two very different views of these constraints, compare Epstein, Toward a Revitalization of the Contract Clause, 51 U. Chi. L. Rev. 703 (1984) (constraints like contract clause designed to shrink sphere of government activity and thus preclude legislative preoccupations with certain areas of factional dispute), with Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689 (1984) (constraints designed to prevent the exercise of raw political power by one group over another).

money that was paid out to the individuals who sold their votes, with something left to compensate the buyer for the labor and entrepreneurial risk. If vote selling were fully legal, there would be no reason to limit sales to ones for hard cash, for individuals could make (secured) promises to make payments from the public treasury after election. Vote buyers would finance their purchases out of the pockets of third parties. Prohibiting the sale of votes is thus a low-cost way of preventing these extreme forms of abuse.

To be sure, the prohibition against selling votes is by no means perfect. Some vote selling can take place outside the shadow of the law. In addition, political candidates can run for public office by making general promises that are akin to the purchase of votes: there are the standard campaign promises of favorable treatment, be it domestic content legislation for automobile manufacturers and workers, subsidies for farmers, retraining grants for displaced workers, or increases in social security. I do not wish to condone any of these devices; indeed, I would support a workable system of constitutional restrictions on the power to dole out subsidies to interest groups. But that system is most assuredly not in place today. A simple restriction on selling votes should not be disparaged even if it does not offer a complete answer to the problem of political abuse. As with water rights, some restrictions against alienation may be desirable in order to prevent dissipation and expropriation of common pool assets.

III. A Note on Distribution

I now turn to the use of restraints on alienation to pursue distributional goals. The justifications for general wealth distribution lie outside the focus on common law rules of this Article. It is important, however, to address the question of means to distributive ends. My basic position is that if the ends are proper, then they are best achieved through taxation, which at least has the rough virtue of working redistributions from rich to poor. The relative case for redistribution through taxation is reinforced by noting the odd results that occur when alienation rules are used to achieve that end. In order to make the point here, I take only three examples discussed in Professor Rose-Ackerman's paper: the sale of blood, homesteading, and voting rights.[37]

I think that a good deal can be said for limiting the sale of blood in order to control the problem of fraud when there is no effective way to distinguish between good and bad blood. But I do not see why any distributional argument is sufficiently powerful to overcome the very real efficiency losses that, as Professor Rose-Ackerman demonstrates, follow from the free distribution of blood, purchased of course with the

37. See Rose-Ackerman, supra note 1, at 945–49, 957–63, 966–67.

tax dollars of others.[38] Where there is a workable charitable market, the system of coerced subsidies seems unattractive. A fortiori, I can think of no more unlikely place for regulation than in organ transplants. If two cousins cannot work out their differences, no system of direct public controls will handle the bilateral monopoly problem.[39]

Similarly, I am very uneasy about the distributive arguments that Professor Rose-Ackerman makes in favor of homesteading laws.[40] To be sure, there may be some difficulty in getting isolated individuals to settle in the plains, but this hardly justifies the set of inefficient rules that, in sharp opposition to the first possession rules at common law, required individuals to remain on their claims indefinitely in order to perfect title. It seems likely that some less restrictive alternative could have met the joint demands of national security and efficient land use. For example, the government could have sold off the lands in large plots (say several square miles or more) to speculators who thereafter would have to internalize all the costs of letting the land go into use slowly. These speculators would then have had the proper incentives to experiment with different terms of sale, including sales of variable plot sizes, to take into account the subtle differences in local conditions. National security could have been furthered by erecting forts at strategic locations, or even by a simple condition that the large land plots be occupied by some minimum number of persons. In fact, the severe restrictions of the homesteading laws might well have discouraged settlement in the first place.

The same arguments can be extended to voting. One might argue that restrictions on the right to sell votes are designed to prevent exploitation of the poor, who might be induced to part with their vote for a song. But the argument seems misguided on both historical and theoretical grounds. Historically, the prohibition against selling votes existed even when a property requirement explicitly barred the poor from the franchise. The fear of rent-seeking and intrigue more effectively explain why the prohibition remains than does the concern with exploitation. In addition, it is difficult to see why exploitation should occur. Between a buyer and seller of votes there is no obvious externality, and no reason why the poor vote holder could not command a fairly attractive sum for the vote in question, especially when rival factions are bidding for control. Here, too, the distributional consequences are uncertain and uninformative, while the dangers of destroying the public and private wealth are manifest. Ad hoc distributional arguments introduce a jarring note into the analysis by

38. See id. at 945–49.

39. See id. at 949.

40. This theme has become commonplace in the literature. See Heiner, The Origin of Predictable Behavior, 73 Am. Econ. Rev. 560 (1983); Merrill, Trespass, Nuisance, and the Costs of Determining Property Rights, 14 J. Legal Stud. 13 (1985).

allowing us to justify restraints on alienation that unwisely go beyond the need to control for external harms and common pool problems.

CONCLUSION

The purpose of this Article was to explain why restraints upon alienation persist in a world in which a sale of assets is generally a welcome event. Rules restraining alienation are best accounted for, both positively and normatively, by the need to control problems of external harm and the common pool. In essence the restraint on alienation is a substitute for direct remedies for misuse when these are costly and uncertain to administer. In speaking of the restraints upon alienation it is necessary to address those natural resources and human activities that are most difficult to organize and control. But it is important to keep the problem in perspective. The sale of alcohol creates problems that the sale of milk does not. The organization of water rights is far more difficult than the organization of rights in land. In most situations the standard set of contract and tort remedies do very well indeed, so that there is no reason to deviate from a system that compensates for harm inflicted and demands that persons who make serious promises keep them. That these two principles account for so much of the law should be treated as a source of both intellectual and social comfort, for it means that most cases can be handled simply and directly.

There is a regrettable tendency today to deplore simple solutions and to praise systems that seek to balance imponderables in broad areas of human behavior. Yet when it is recognized that complex systems are costly to administer and that discretionary behavior gives scope to opportunism and political intrigue, then the virtues of simple and hardier rules may be more appreciated. While some individual cases may be hard, the theory is reasonably straightforward, for the goal is always to reduce (to paraphrase Calabresi on accidents) the sum of costs attributable to three sources: (a) the misconduct of actors, (b) the loss of gains from proper conduct prevented or restricted, and (c) the administrative costs of the regulatory scheme.[41] So long as we keep the central principle in mind, we can cope with the uncertainties of its application.

41. See G. Calabresi, The Costs of Accidents (1970).