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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 ac-

* James Parker Hall Professor of Law, University of Chicago. I have benefitted from helpful criticisms received when the paper was presented at a workshop held at the University of Southern California Law School in February, 1985. I should also like to thank Sharon Epstein and Matthew Hamel for their research assistance on this article.

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

count 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.

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 control⁷ 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:

$$\text{if } V_b - V_s > T_s + T_b,$$

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 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 routine 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

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

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*).

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. “Prorating 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 outsid-

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.

ers; or they may be sold with the approval of the owners of sixty percent of the other shares.

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 usufructuary, 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 usufructary'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 harder 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).