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The Dead Hand and the Law of Trusts in the Nineteenth Century

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This article discusses a basic paradox at the core of liberal property law.[1] Individual freedom to dispose of consolidated bundles of rights cannot simultaneously be allowed and fully maintained. If the donor of a property interest tries to restrict the donee's freedom to dispose of that interest, the legal system, in deciding whether to enforce or void that restriction, must resolve whose freedom it will protect, that of the donor or that of the donee.

Although post-realist American property lawyers acknowledge this conflict, at least nominally,[2] it did not emerge in legal consciousness in so starkly visible a form until the end of the nineteenth century. Several features of antebellum legal thought

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1. Two characteristics distinguish liberal property law. First, it promotes individual freedom of disposition as the basic mechanism for allocation. Second, it exhibits a strong preference for a fully consolidated form of property interests. By "consolidated form" I mean that liberal property law seeks to concentrate in a single legal entity, usually an individual person, the relevant rights, privileges, and powers for possessing, using, and transferring discrete assets. This description of the conceptual model of property rights under the regime of liberal legalism is, of course, very crude and incomplete. It is sufficiently accurate, however, for my purpose of discussing the conceptual dilemmas historically posed by what Charles Donahue calls the "agglomerative tendency" of Anglo-American property law. Donahue, *The Future of the Concept of Property Predicted From Its Past,* in NOMOS XXII: PROPERTY 28 (1980). Frank Michelman provides an elegant description of the liberal model of property in his paper, *Ethics, Economics, and the Law of Property,* in NOMOS XXIV: ETHICS, ECONOMICS, AND THE LAW 3, 8–21 (1982). What he there labels as the "policy of internalization" is analogous to what I refer to as the consolidation form, and he discusses the "contradictory implications" of that policy in very similar terms to those used in this article. Unlike this article, however, his focus is analytic and not historical.

2. *See, e.g.,* RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS, introductory note, part II, at 2–3 (Tent. Draft No. 3, 1980). In Part IV, I shall discuss how modern policy analysis attempts to evade the conflict even while purporting to recognize it.

obscured the problem in the "dead hand"[3] doctrines. Incident to the Classical, or late nineteenth century, effort to recategorize and rationalize private law rules on the basis of "scientific" principles that abandoned the old "feudal" policy supporting property's "technical" elements, these pre-Classical mediating devices began to erode. With the disintegration of the pre-Classical conceptual structure, Classical lawyers explicitly faced the problem of the freedom of disposition principle. Their effort to construct a synthesis that resolved the contradiction on an objective basis and that assimilated equitable with legal doctrine failed toward the end of the nineteenth century.

The demise of the Classical synthesis was signaled by the adoption in most jurisdictions of a pair of new trust law doctrines

3. Historical understandings of the "dead hand" problem have been discontinuous, so one cannot accurately speak of a monolithic problem. This discontinuity is reflected in the stages of usage of the term "dead hand" itself. One strand of usage associated the dead hand with that of the donee, specifically, alienations of land to religious corporations. Since such bodies never died, transfers to them would place land in *mortmain*. This aspect of the dead hand question and its effect upon the development of the law of charitable transfers has received too little attention from legal historians. Stanley Katz's work-in-progress on the history of American charity law promises to remedy the oversight for the American side. The discontinuities within the development of the law regulating charitable trusts are discussed in his recent illuminating paper. Katz, Sullivan & Beach, *Legal Change and Legal Autonomy: Charitable Trusts in New York, 1777–1893*, 3 LAW & HIST. REV. 51 (1985).

In the nineteenth century the term was identified with all property settlements, both charitable and private, that resulted in making property less accessible to public use. In Victorian and Edwardian England the dead hand was a central symbol in the land debate and was part of the argument by which Liberals like Sir Arthur Hobhouse developed Individualist premises in a Collectivist direction. *See* A. HOBHOUSE, THE DEAD HAND: ADDRESSES ON THE SUBJECT OF ENDOWMENTS AND SETTLEMENTS OF PROPERTY (1880). The New Liberal theme that public control of land was required for the common good was developed by his more famous nephew, Leonard Hobhouse, in a famous essay, *The Historical Evolution of Property in Fact and in Idea*, in PROPERTY: ITS DUTIES AND RIGHTS (C. Gore ed. 1922). For a discussion of this essay in the context of late Liberal thought and its transition to Collectivism, see S. COLLINI, LIBERALISM AND SOCIOLOGY: L. T. HOBHOUSE AND POLITICAL ARGUMENT IN ENGLAND 1880–1914, at 129–46 (1979). For an account of J.S. Mill's increasingly radical attitude to land, breaking from the orthodoxy of political economy, see W. WOLFE, FROM RADICALISM TO SOCIALISM: MEN AND IDEAS IN THE FORMATION OF FABIAN SOCIALIST DOCTRINES, 1881–1889, at 52–65 (1975).

In the United States the term was used less in the service of radical thought than to support progressive reform. Exemplary of this tendency is 1 R. ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH 451–74 (1914). For discussions of Ely's thought, see S. FINE, LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE 198–251 (1956) (setting it in relation to the thought of the new political economists, such as John R. Commons, Edmund James, Andrew Dickson White, Edward Bemis and Henry Center Adams, who established a middle ground between laissez-faire theory and socialism), and R. WIEBE, THE SEARCH FOR ORDER 1877–1920, at 141, 155–56 (1967) (setting it in relation to the turn toward altruistic values that preceded Progressivism).

that reversed established trust rules. The spendthrift trust doctrine permitted trust transferors to tie up a beneficiary's interest by imposing direct restraints on its alienability.[4] The *Claflin* doctrine soon thereafter immunized private trusts from attempts by beneficiaries to destroy them through premature termination.[5] Far from being reconcilable with the conventional property rules which invalidate most restraints on legal interests,[6] these doctrines placed trust and property, equity and law in fundamental conflict over the problem of freedom of disposition.

This doctrinal development and the changes in legal consciousness that underlay it are central to a historical understanding of the ideology of private property in liberal legal thought. Anglo-American lawyers have long identified the lifting of restraints on alienation as the major defining characteristic of a liberal commercial society as opposed to a feudal one.[7] Along with liberty of contract, free alienation is one of the keystones of the twin policies of promoting individual autonomy and free exchange in competitive markets. Nineteenth century lawyers conflated the distinction between state-imposed restrictions on alienation and privately imposed restraints, treating the policy underlying rules proscribing the latter as continuous with the policy opposed to the old feudal restraints. Their historical vision, which persists today, sees the development of the law of disposition as continuous and directional. Within this vision, modern lawyers have pushed the deviationist trust rules into a corner as aberrational or accommodated them on the basis of instrumentalist accounts of the doctrines as pragmatic responses to

4. *See* text accompanying notes 39–41 *infra*.

5. *See* text accompanying notes 43–45 *infra*.

6. For a typical example of work in this vein, see the series of articles by Schnebly, *Restraints upon the Alienation of Legal Interests*, 44 YALE L.J. 961, 1186, 1380 (1935). The history of English land law is basically reduced in this work to theme and variation, the theme being a battle pitting the dynasts (feudal nobility or, later, newly landed gentry) versus the royal courts (lovers of alienability or pawns of the Crown). *See also* 6 AMERICAN LAW OF PROPERTY § 26.1, at 409–10 (A.J. Casner ed. 1952).

7. On this theme of alienability as the unifying element in the development of Anglo-American property law, A.W.B. Simpson has succinctly expressed the conventional wisdom:

> Modern textbooks as well as historical works tend to portray the law of real property as a body of law which has zealously protected the power of free alienation of land, and the rule against perpetuities (and associated doctrines) as an effective curb against attempts to destroy this power in landowners.

A. SIMPSON, AN INTRODUCTION TO THE HISTORY OF THE LAND LAW 224 (1961); *see also* L. SIMES, PUBLIC POLICY AND THE DEAD HAND 33–36 (1955).

existing social "needs."[8]

Against this consensus view, this article relates the doctrinal conflict between property and trust law to the internal contradic-

8. Bordwell, *Alienability and Perpetuities II,* 23 IOWA L. REV. 1, 22 (1937). Elsewhere he writes:

> [O]ne is struck by the fact that the makers of the English law were not men with one-track minds. They did not start out with general notions of alienability or of remoteness of vesting but took institutions and the common forms of conveyances as they found them and adapted both to their needs.

Bordwell, *Alienability and Perpetuities VI,* 25 IOWA L. REV. 707, 707 (1940).

This consensus view has undergone revision in recent historical scholarship. The revisionist account views the problem of dead hand control in terms of conflicts between various social groups, whose identities vary as the social and economic background changes. In the later Middle Ages, while feudalism still prevails, though weakened, the conflict is between landholders and lords. By the sixteenth and seventeenth centuries, with the passing of feudalism and the emergence of mercantilism, a new tension emerges between "the established country landowner seeking to perpetuate his family and the newly wealthy man of commerce seeking to buy country land." Donahue, *supra* note 1, at 42. Thus the common law Rule Against Perpetuities, the notable product of this latter conflict, is now seen as a rational compromise by conservative seventeenth century judges who were sympathetic to the interests of the established landed aristocracy and fashioned an informal, rather open-ended "doctrine" (not "Rule") that favored the entrenched gentry without permitting them to lock up their lands completely. *See* Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities,* 126 U. PA. L. REV. 19 (1977). This history is revisionist in the sense that it does not describe the development of doctrines like the Rule Against Perpetuities as stimulated by the desire of common law judges to promote the all-important policy of alienability, as Maitland had. Its message is not as clearly progressive and validating as that which emphasizes the continuity of the alienability theme, for it considers dead hand doctrines to be the products of shifting alignments of interest groups and power. Yet this history is still essentially adaptationist. If the Rule Against Perpetuities was not developed to adapt property law to the needs of an emerging market economy, it did adapt to the "needs" of a particular social group with which common law judges were in sympathy. By identifying discrete and powerful social groups and linking together their postulated needs and the legal doctrine, this revisionist mode of history renders coherent the development of property law doctrines dealing with the dead hand problem. It shares with directional history the premise that the conflict, of which the dead hand problem is expressive, between the two ideals of post-feudal property law, alienability and individual autonomy, can be and has been reconciled in a rational, instrumental way. The legal system's responses to recurrent instances of the dead hand question are rational responses either to social needs or to those of a powerful interest group; under both views, they are the necessary products of the prevailing mode of economic organization. For a more skeptical account, which can usefully be contrasted with that of Haskins, see A. SIMPSON, *supra* note 7, at 195–96.

The spendthrift trust and Claflin doctrines were studied in Lawrence Friedman's history of American trust law doctrines. Friedman, *The Dynastic Trust,* 73 YALE L.J. 547 (1964). By juxtaposing these doctrines with the nineteenth century rules concerning trust investments, Friedman focused on the judicial reaction to the "dynastic" motive. His concern was with identifying the long-term, dynastic trust as a discrete category of private trusts in society. The classificatory scheme of the law of trusts does not distinguish among trusts according to the background motives of their creators; the same rules apply to short-term "caretaker" trusts as to the dynastic variety. But the doctrinal

tion in the liberal legal principle of freedom of disposition. The historical account offered here suggests that within the individualistic regime of consolidated property there is no objective basis for choosing between the autonomy of the donor and that of the donee, the dead hand dilemma; any resolution of that problem is a "naked preference."[9]

Briefly to describe the organization of this article, Part II is more strictly doctrinal in focus. It attempts to establish that the new trust doctrines did create a conflict between law and equity on the question of restraints, a topic of central concern to the nineteenth century. Part III then attempts to contextualize this doctrinal conflict within the transition between two distinct modes of legal consciousness in the nineteenth century. I try to reconstruct the conceptual universe within which legal discourse about the dead hand problem occurred. My aim is to move explicitly beyond the conventional instrumentalist accounts of these doctrinal developments in the belief that such accounts are too limited, in that they ignore the constraints that conceptual structures exert upon the development of legal doctrine.[10] Part

development of American trust law has been influenced in fact by the difference between these two trust types.

Friedman's paper is exemplary of the Hurstian perspective of legal development. It is (properly) impatient with formalism and objectivism—the controversy over the trust doctrines was not about impersonal principles immanent in the legal order but about "the legitimacy of the dynastic motive." *Id.* at 580. It also stresses the theme of adaptation—the story of American trust law has been one of "fitting inherited concepts and traditions to new needs, institutions, and functions." *Id.* at 591. The adaptationist perspective does not lead, however, to optimistic endorsement of the doctrines as serving the needs of society. The interests that were served by the new doctrines were those of the holders of mercantile fortunes who, in the social and economic instability of the late nineteenth century, sought to protect estate-entities against social change. This thesis contrasts with other possible variants of the adaptationist mode of explanation. For example, the spendthrift trust doctrine might be explained as a pragmatic response to industrial expansion by adapting the trust form, with its characteristic separation of enjoyment and management, to promote capital formation and security of exchange. In this vein, the trust might be analogized to the corporation, whose form shares with the trust the same separation of ownership and investment responsibility. Both forms offered opportunities for new sources of capital accumulation, and the doctrinal development proceeded in a direction that allowed these opportunities to be exploited. For an example of work in this vein, see Clark, *The Interdisciplinary Study of Legal Evolution,* 90 YALE L.J. 1238 (1981). By contrast, Friedman's view is essentially that the trust doctrines allowed the dynastic desires of a particular social group to be realized; there is no attempt to validate the development by linking the interest of the benefited class with the needs of society in general.

9. Sunstein, *Naked Preferences and the Constitution,* 84 COLUM. L. REV. 1689 (1984).

10. In failing to contextualize the doctrinal development within an account of the "historically situated social relations" of the time and place, Munger & Seron, *Critical*

IV continues the story through our own time by providing a brief discussion of modern attempts at mediation of the dead hand dilemma. It is not intended, however, to provide a comprehensive critique of modern policy analyses. In conclusion, Part V suggests the lessons of the historical experience discussed in this article for the future of the consolidated model of property.

Legal Studies versus Critical Legal Theory: A Comment on Method, 6 LAW & POL'Y 257, 266 (1984), I do not mean categorically to deny that social or economic factors, perhaps even including those exclusively emphasized by Friedman, *see* note 8 *supra,* bear some relationship to the doctrinal developments. I treat ideas neither as "causes" of social behavior nor as "consequences" of a material base. Rather my premise is that ideas are better understood as "templates for the organization of social and psychological processes." C. GEERTZ, *Ideology as a Cultural System,* in THE INTERPRETATION OF CULTURES 193, 218 (1973). I do deny that doctrinal development is explicable solely in terms of social, economic, or political contexts. That is, my assumption is that judicial law development is relatively autonomous. Judges and lawyers are engaged in language virtually to the exclusion of any other form of activity. Within their language activity they develop elaborate conceptual structures. Those structures impose limitations upon what lawyers are able to perceive and, consequently, effectuate. However strongly the demands of "needs" of some social group may be felt, then, judicial responses will be confined at any particular time to the choices recognizable within the extant conceptual structure. For example, in Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis,* 82 COLUM. L. REV. 1545 (1982), I discussed the limitations that liberal legal conceptual structures have placed on the perceptions of what social interests are legally protectable as "property." Furthermore, given the weaknesses of those histories that have attempted to link social and economic factors with doctrinal development, notably M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977), it seems prudent to begin interpretations of legal doctrine within the legal intellectual context of the doctrine itself. Thus my attempt here is to provide a narrative context—nineteenth century American legal writings—within which to interpret the freedom of disposition principle. For a qualified defense of such narrative accounts, see Heller, *Structuralism and Critique,* 36 STAN. L. REV. 127, 165 n.68 (1984). On the limiting effect of ideas, the influential essay by Clifford Geertz, *Ideology as a Cultural System,* in THE INTERPRETATION OF CULTURES, *supra,* is unsurpassed. I have also been influenced by Gordon Wood's paper, *Intellectual History and the Social Sciences,* in NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY 27–41 (1979), and Thomas Haskell's paper, *Deterministic Implications of Intellectual History,* in *id.* at 132–48.

I should also respond in this methodological note to another criticism that is commonly leveled against accounts, such as mine, that emphasize the cultural and historical contingency of doctrine. The criticism seeks to turn the assumption of contingency against itself by asking how the historian can avoid the conceptual limitations imposed by her own culture. That is, the history of *mentalities,* in this view, invariably ends up as a reflection of the mentality of the historian's group, not that of the subject. It is a nice debater's point, but one that I think is answerable, at least provisionally. External analysis of historical thought-structures becomes possible as such structures recede in time. Historians are thus defined as Hegel's Owl of Minerva, "one who imposes pattern on thrusts of creativity after they are over, critic to the historical actor's artists." J. POCOCK, POLITICS, LANGUAGE AND TIME 273, 279 (1971).

II. Restraints in the Law of Property and the Law of Trusts in the Nineteenth Century: Doctrinal Change and Conflict

A. *The Pre-Classical Rules, 1800–1875*

1. *The property rules.*

Well before the nineteenth century, common law judges had developed a collection of rules regarding the validity of restraints imposed by landowners on the alienability of legal interests. By 1800, English land law had classified restraints into the familiar categories of disabling, forfeiture, and promissory and had settled the validity of each of these categories as applied to the various types of interests in land. The validity of any given restraint turned on classification at two levels, the type of interest restrained and the type of restraint used.[11] As to fee simple estates, both disabling and forfeiture restraints were generally invalid. Disabling restraints imposed on life estates were almost never enforced, but forfeiture restraints on life estates and leasehold estates commonly were, especially if they were part of family property settlements. The collective effect of these rules was to consolidate control in the transferee and to promote the autonomy of property owners. Ownership was acquired by transfer through transactions that were clean breaks between transferor and transferee.

During the first two-thirds of the nineteenth century, American courts for the most part adhered both to the results of the English rules on direct restraints and to the classificatory apparatus by which those rules were organized. The judicial hostility to direct restraints on alienation was at least as pronounced in the United States as it was in England. And despite the instrumental nature of judicial reasoning which has been said to characterize antebellum American case law in other areas,[12] American courts widely followed the English example of determining the validity of particular restraints on the basis of their form rather than their practical effect, either in general or in specific situations. Little, if any, attention was paid to the peculiar historical conditions under which the English structure of rules developed.

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11. For a brief description of this conventional classificatory analysis and a Realist critique of its formality, see M. McDougal & D. Haber, Property, Wealth, Land: Allocation, Planning and Development 159–62 (1948).

12. *See* M. Horwitz, *supra* note 10.

2. *The trust rules.*

The question of the validity of restraints on the interest of trust beneficiaries involved a prior question of legal theory that did not arise in the context of restraints on legal estates. This was whether the equitable interest of trust beneficiaries was alienable at all, or rather on what theoretical basis the alienability of such interests was to be explained.[13] From one perspective the beneficiary's interest could be seen to be merely personal, growing out of a relationship of confidence between him and the trustee, who held legal title. In this sense it resembled the in personam right of a creditor which the common law had considered to be of a highly personal character and so early on had held to be nonassignable.[14] But even though it was not a true in rem property interest, equity had quite early regarded the beneficial interest as assignable property.[15]

The equitable conception of property in general was wider than that of the common law, indicated by the enforcement in equity of assignments of a variety of interests nonassignable at common law, including debts and mere expectancies.[16] The assignability of the trust beneficiary's interest, however, was not ra-

13. On the late nineteenth and early twentieth century debate concerning the "nature" of the trust beneficiary's interest, either as a right in personam, enforceable in equity against the trustee, or as an in rem proprietary interest in the assets held in trust, see F. MAITLAND, EQUITY 29, 107 (2nd. ed. rev. 1936) (in personam); J. AMES, LECTURES ON LEGAL HISTORY 76, 262 (1913) (in personam); Stone, *infra* note 63 (in personam); Scott, *The Nature of the Rights of the Cestui Que Trust,* 17 COLUM. L. REV. 269 (1917) (in rem); Durfee, *Equity in Rem,* 14 MICH. L. REV. 219 (1915) (in rem).

14. *See* P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 135 (1979); 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 334 (3d ed. 1945).

15. *See* 4 W.HOLDSWORTH, *supra* note 14, at 432–43; 5 *id.* at 334.

Professor Bordwell divided the history of Chancery equity, and its handling of the trust, into three stages: (1) the period of the use to the Statute of Uses, 1535–36; (2) from the Statute of Uses to the Chancellorship of Lord Nottingham, 1673; (3) from Nottingham's Chancellorship to the merger of law and equity by the Judicature Act of 1875. Bordwell, *Equity and the Law of Property,* 20 IOWA L. REV. 1, 3 (1934). During the third, great period of growth, the notion of "equitable ownership" came to be understood as an ownership of the underlying trust property itself rather than merely of the trust. *Id.* at 21.

For a discussion of the notion of equitable ownership, suggesting that it was vital in assimilating law and equity, see R. TURNER, THE EQUITY OF REDEMPTION 65–87 (1931). I discuss the relationship between the development of the theory of the law/equity relationship beginning with Nottingham's chancellorship and the doctrinal development of trust law in G. ALEXANDER, EQUITY, DISCRETION, AND THE RISE OF CLASSICAL TRUST LAW (1985) (forthcoming).

16. Equitable recognition of the assignment of nonproperty expectancy interests took the form of specific performance of what was treated as a contract to sell the inter-

tionalized as a simple consequence of the enforcement in equity of assignments of debts, for "[t]he Court of Chancery struggled hard to prevent its darling [the trust beneficiary] from falling to the level of a mere creditor."[17] Maitland suggests that, while not contradicting the common law's determination of the trustee as the "true owner," equity sought to strengthen the beneficiary's interest by conceiving of the "use" as an incorporeal thing which, like tangible land, could then be divided into estates in the same way as the common law permitted so that the beneficiary held an estate, not in land or other things but in the "use." In other words, equity reified the equitable interest just as it reified the assets with respect to which the beneficiary had an interest as a "trust res," and in doing so permitted the alienation of that interest as fully as the common law permitted alienation of legal interests.[18]

Prior to the nineteenth century there were indications that equity was more permissive than the common law concerning attempts by landowners to settle their estates in ways that effectively frustrated alienability for extensive periods.[19] Largely because of Lord Eldon's efforts to move equitable doctrines toward greater compatibility with the common law,[20] this tension began to dissolve in the first part of the nineteenth century. Although the strict settlement was still enforced until late in the century,[21] equity after 1800 added no new trust doctrines that

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est when it legally accrued. The cases are discussed in Dawson, *Economic Duress—An Essay in Perspective,* 45 MICH. L. REV. 253, 267–76 (1947).

17. F. MAITLAND, *Trust and Corporation,* in SELECTED ESSAYS 172–73 (1936).

18. *Id.* at 164–74.

19. Thus, Sugden stated in the first edition of his famous treatise on powers, published in 1808: "By our law one man may create an unalienable personal trust in favour of another, for his support and maintenance." E. SUGDEN, A PRACTICAL TREATISE OF POWERS 105 (1808). With the decision of *Brandon v. Robinson* in 1811, however, the second edition, published in 1815, eliminated this statement and substituted the following: "[B]y our law, if an estate is given to a man, he must take it with all its incidents." E. SUGDEN, A PRACTICAL TREATISE OF POWERS 109 (2d ed. 1815).

20. Professor Milsom has pointed out that "the development of equity, more than of any other body of English doctrine, was the work of identifiable persons." In the nineteenth century, it is Eldon whose personal influence on the development of doctrine is most conspicuous. S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 95 (2d ed. 1981). For a perceptive discussion of Eldon's influence on Equity and the complexity of, and contradictions within, his ideas, see ATIYAH, *supra* note 14, at 361–69 (eighteenth century conservatism indicated by view of companies as illegal monopolies; compatibility with nineteenth century liberalism indicated by restriction of equitable protection against penalties and forfeitures). *Cf.* A. SIMPSON, *supra* note 7, at 196.

21. Through the strict settlement, which was developed by conveyancers during

were substantively in conflict with the common law doctrine governing property settlements. To the contrary, the nineteenth century English trust doctrines reinforced the established common law doctrines restricting the power of settlors to impose restraints on the alienability of their transferees' interests.[22]

Restraints on alienability of the beneficiary's interest. In 1811, Lord Eldon in the famous case *Brandon v. Robinson*[23] clearly established the rule that a disabling restraint could not validly be imposed upon the alienability of an equitable life estate. In *Brandon* the beneficiary, Thomas Goom, was given an equitable life estate with the statement that it "should not be grantable, transferable, or otherwise assignable, by way of anticipation of any unreceived payment . . . ."[24] Goom became bankrupt, and his assignee sued to enforce the assignment of Goom's life interest. Eldon ruled in favor of the assignee, holding that the restraint was void. At the same time, however, he observed that the interest of Thomas Goom could have been given to him "until he shall become bankrupt." Such language would have made the beneficiary's interest subject to a special limitation with the effect of "reducing the interest short of a life estate . . . ."[25] For the same reason, a trust beneficiary's life interest could be limited to end if he attempted to transfer the interest or if creditors attempted to reach it. A trustor could not, however, directly restrain the alienability of an absolute interest for life given to the beneficiary.

Eldon's decision in *Brandon v. Robinson* substantially incorpo-

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the seventeenth century, landowners could keep their property within their families generation after generation. Essentially, the form was a life estate in the settlor's son with remainder in tail to the life tenant's eldest son, followed by similar remainders to each of the life tenant's other children, and a final remainder in fee simple to the settlor's own legal heirs. If and when the life tenant's eldest son came of age the two would resettle the land, providing a life estate in remainder to the eldest son and an entail in remainder to the son's son, and so forth. It involved, then, a continual resettlement of the estate each generation, but always for the purpose of keeping the estate in the hands of a succession of limited owners. The strict settlement is discussed in relation to the social conditions prevailing in England at the time of its development in L. BONFIELD, MARRIAGE SETTLEMENTS, 1601–1740: THE ADOPTION OF THE STRICT SETTLEMENT (1983).

22. One must hasten to add, however, that this compatibility did not necessarily characterize all concerns of property law that affected alienability of land. One obvious area in which there was discrepancy between legal and equitable approaches during the nineteenth century, both in England and the United States, was the law of servitudes. *See* text accompanying note 50 *infra*.

23. 34 Eng. Rep. 379 (1811).

24. *Id.* at 379.

25. *Id.* at 381.

rated the common law rules on restraints into the law of trusts. It assured that settlors could gain no advantage, in terms of greater freedom to secure to their life tenants the benefit of settled property without the risks of improvident actions or third-party claims, by using the trust form rather than by creating successive legal estates. The resulting parity between trust and property doctrines was a partial fulfillment of Eldon's objective more completely to assimilate equity and Law.

The rule of *Brandon v. Robinson* was followed by a number of American courts during the first part of the nineteenth century.[26] There were exceptions to the rule, however. For example, Pennsylvania decisions prior to 1850 had indicated approval of restraints on alienability of the beneficiary's interest,[27] but those cases have been explained as a consequence of the peculiarity of Pennsylvania's lack of courts having equity jurisdiction in the early part of the nineteenth century.[28]

In New York, the famous 1828 statutory revision of real property law made virtually all trusts into spendthrift trusts, even without any provision to that effect in the trust instrument. The code attempted to abolish all private trusts in land except for a few specifically designated purposes, of which the most important was a trust "to receive the rents and profits of lands, and apply them to the education and support"[29] of a beneficiary during the beneficiary's lifetime. To secure this support purpose, income necessary for the beneficiary's education and support was immune from creditors, but accumulated income in excess of such amounts was reachable. Furthermore, the beneficiary could not voluntarily alienate his interest. In 1830 the restriction to "education and support" was removed by legislative amend-

26. *E.g.*, Nichols v. Levy, 72 U.S. (5 Wall.) 433 (1866); Smith v. Moore, 37 Ala. 327 (1861); Hallett v. Thompson, 5 Paige Ch. 583 (N.Y. Ch. 1836); Mebane v. Mebane, 39 N.C. (4 Ired. Eq.) 131 (1845); Tillinghast v. Bradford, 5 R.I. 205 (1858); Heath v. Bishop, 25 S.C. Eq. (4 Rich. Eq.) 46 (1851).

27. *E.g.*, Vaux v. Parke, 7 Watts & Serg. 19 (Pa. 1844); Ashhurst v. Given, 5 Watts & Serg. 323 (Pa. 1843); Holdship v. Patterson, 7 Watts 547 (Pa. 1838); Fisher v. Taylor, 2 Rawle 33 (Pa. 1829).

28. E. GRISWOLD, SPENDTHRIFT TRUSTS UNDER THE NEW YORK STATUTES AND ELSEWHERE—INCLUDING INSURANCE PROCEEDS § 26(1), at 21–23 (2d ed. 1947); J. GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY §§ 214–218, at 193–96 (2d ed. 1895). On the history of Equity jurisdiction in Pennsylvania state courts, see L. FRIEDMAN, A HISTORY OF AMERICAN LAW 130–31 (1973).

29. 1 Rev. Stats. N.Y. (1829), Part II, ch. 1, art. II, § 55(3), at 728. See text accompanying notes 57–62 *infra* for a fuller discussion of the New York property law reform.

ment,[30] as a result of which trusts could be created without dollar limit but still subject to the mandatory restraint on alienation of the income beneficiary's interest. Apart from such statutory restraints and isolated judicial decisions, however, the English doctrine against restraints on the alienability of the trust beneficiary's interest was generally followed by American courts.

Termination of trusts by beneficiaries. Essentially the same pattern of doctrinal change occurred with respect to the question of the power of beneficiaries to compel termination of trusts prior to the time designated by the trustor for termination and distribution of trust assets. English chancery courts denied the power of a trustor to postpone possession of trust property by a legally competent beneficiary for his life or a period of time after attaining the age of majority where the beneficiary had been given the entire equitable interest. In *Saunders v. Vautier*, decided in 1841,[31] Lord Langdale, the Master of the Rolls, held that the sole beneficiary of a trust was entitled to have the trust property transferred to him upon his attaining the age of majority even though the trustor had provided that the trust was to continue until the beneficiary reached age twenty-five. There was no condition that the beneficiary survive to the stated age; therefore, his interest was indefeasibly vested at the inception of the trust.[32] Langdale expressed the principle in this way:

> [W]here a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge.[33]

The decision was affirmed by the Chancellor, Lord Cottenham.[34]

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30. 1830 N.Y. Laws, ch. 320, § 10, at 386–87.

31. 4 Beav. 115, 49 Eng. Rep. 282 (Ch. 1841).

32. This determination was consistent with the principles of construction established in Clobberie's Case, 2 Vent. 342, 86 Eng. Rep. 476 (Ch. 1677).

33. *Saunders*, 4 Beav. at 116, 49 Eng. Rep. at 282. This statement makes it clear that the "rule" of *Saunders v. Vautier*—that all of a trust's beneficiaries may compel premature termination—was not obviously announced in *Saunders* itself. As M.R. Chesterman points out, the case merely applied to trusts the principle of the law of wills that a sole adult legatee may call for payment of a vested legacy in disregard of directions to retain the sum and accumulate income for some period. The case quickly came to stand for a proposition broader than this relatively limited extension of principle, however. *See* Chesterman, *Family Settlements on Trust: Landowners and the Rising Bourgeoisie*, in LAW, ECONOMY & SOCIETY, 1750–1914: ESSAYS IN THE HISTORY OF ENGLISH LAW 124, 153–54 (G. Rubin & D. Sugarman eds. 1984).

34. Cr. & Ph. 240, 41 Eng. Rep. 482 (1841).

Although the doctrine of *Saunders* was not accepted by the House of Lords until some fifty years later,[35] it was quickly and widely followed in equity practice. In *Curtis v. Luken*, decided in 1842,[36] the Master of the Rolls explained the *Saunders* doctrine:

> [The beneficiary] has the legal power of disposing of it, he may sell, charge, or assign it, for he has an absolute, indefeasible interest in a thing defined and certain; the Court, therefore, has thought fit . . . to say, that since the legatee has such the legal right and power over the property, and can deal with it as he pleases, it will not subject him to the disadvantage of raising money by selling or charging his interest, when the thing is his own, at this very moment.[37]

The court here explicitly connected the question of a beneficiary's power to compel termination in anticipation of the time prescribed by the trustor with the question of the beneficiary's power to alienate his equitable interest. Since no valid restraint could be imposed upon an equitable fee, a provision postponing possession of the trust estate could not be given effect, since it would be inconsistent with the property interest given to him. The *Saunders* doctrine thereafter was understood to require premature termination when all parties having an equitable interest in the trust and having legal capacity to consent petitioned for termination and distribution of the trust estate.

The English doctrine was generally followed by American courts prior to 1889.[38] Since American courts had followed the English position on the validity of restraints on alienation of equitable interests, including equitable fees and more limited interests such as life estates in income, it was to be expected that they would not enforce provisions postponing possession of trust property by legally competent beneficiaries who, individually or collectively, held the entire equitable interest.

B. *The Classical Trust Rules and the Transformation of the Relationship Between Property and Trust Law, 1875–1900*

The overall effect of the pre-Classical English and American trust law rules was to favor the beneficiary in conflicts with the

35. Wharton v. Masterman, 1895 A.C. 186 (H.L.).

36. 5 Beav. 147, 49 Eng. Rep. 533 (Ch. 1842).

37. *Id.* at 156, 49 Eng. Rep. at 536.

38. *E.g.*, Sanford v. Lackland, 21 Fed. Cas. 358 (C.C.D. Mo. 1871) (No. 12,312); Gray v. Obear, 54 Ga. 231 (1875); Thompson v. Ballard, 70 Md. 10, 16 A. 378 (1889); Philadelphia v. Girard, 45 Pa. 9, 27 (1863).

settlor over the power to control the trust's existence and its membership. Moreover, these rules assured that no substantive conflict existed between law and equity as to the dead hand problem. This picture was radically changed, however, with the shift in the dominant American trust rules concerning validity of restraints on alienation and anticipation.

1. *The spendthrift trust and* Claflin *doctrines.*

The move by American courts away from the rule of *Brandon v. Robinson*, which invalidated disabling restraints on equitable life estates, began late in the nineteenth century and continued through the first two decades of the twentieth century. The famous dictum of Justice Miller in *Nichols v. Eaton*[39] in 1875, expressing approval of such restraints, was followed by the 1882 decision of the Massachusetts Supreme Judicial Court in *Broadway Bank v. Adams*[40] upholding the validity of so-called spendthrift restraints. By 1895, the rapid success of the new doctrine was conceded by John Chipman Gray's lamenting observation in the preface to the second edition of his book, *Restraints on the Alienation of Property*: "State after state has given in its adhesion to the new doctrine . . . ."[41] Some limitations on the doctrine were recognized—for example, it was early resolved that a settlor could not validly create a spendthrift trust for his own benefit[42]—but in general the English doctrine had been abandoned and the inalienability of trust beneficiaries' equitable interests had been accepted by the end of the nineteenth century.

With the rejection of the English trust doctrine against restraints on alienation, the parallel doctrine of *Saunders v. Vautier*, invalidating restraints on anticipation, was obviously vulnerable. Predictably, the break was first announced by the Massachusetts court in *Claflin v. Claflin*,[43] seven years after *Broadway Bank*. In *Claflin*, a testator had bequeathed a share of the residue of his estate in trust for his son. The will provided that the trustee was to pay $10,000 of the trust fund to the son at age twenty-one, another $10,000 at age twenty-five, and the balance at age thirty. At age twenty-one the son petitioned to compel the trustees to

39. 91 U.S. 716 (1875).
40. 133 Mass. 170 (1882).
41. J. GRAY, *supra* note 28, at iv (preface).
42. *See* E. GRISWOLD, *supra* note 28, at 542–51; Friedman, *supra* note 8, at 581.
43. 149 Mass. 19, 20 N.E. 454 (1889).

transfer the whole fund to him, but the Massachusetts Supreme Judicial Court denied the petition. The trust was indestructible by the beneficiaries and would terminate at the time specified by the testator. Several earlier decisions had indicated that Massachusetts followed the *Saunders* doctrine and would order termination when requested by beneficiaries who, as in the instant case, held absolute interests.[44] But the *Claflin* court rejected the argument that those cases followed the English doctrine. Rather than holding, as *Saunders* did, that provisions requiring a trustee to hold and manage trust property beyond a beneficiary's age of majority are void where the beneficiary's interest is absolute, the Massachusetts decisions held, according to *Claflin*, that termination would be ordered where the trust's purposes have been accomplished. It was the intention of the testator, not the absolute property interest of the beneficiary, that controlled. In *Claflin* itself, "nothing ha[d] happened which the testator did not anticipate, and for which he ha[d] not made provision;"[45] therefore, termination could not be ordered, if the testator's intention was to be carried out.

The court in *Claflin* distinguished restraints upon anticipation from restraints on alienation and permitted the former to perform the same function as the latter where the latter had not been and could not validly be imposed. No direct restraint had been imposed on the alienability of the beneficiary's equitable interest, and since the beneficiary held a fee interest in the principal, any such restraint probably would have been void. Apparently, the beneficiary argued that since his interest was alienable, the provision postponing possession of the principal was void as inconsistent with the rights of an absolute alienable interest. The court rejected this argument, observing that although the equitable interest was alienable and could be taken by the beneficiary's creditors to satisfy his obligations, it did not follow that the beneficiary had a right to immediate possession of the principal where the testator had provided otherwise. The right to anticipatory possession of trust property could be restrained even though the right to alienate the equitable interest therein had not been and could not be.

Of course, the *Claflin* court could have said that the restraint

44. Sears v. Choate, 146 Mass. 395, 15 N.E. 786 (1888); Inches v. Hill, 106 Mass. 575 (1871); Smith v. Harrington, 86 Mass. (4 Allen) 566 (1862).

45. 149 Mass. at 21, 20 N.E. at 456.

on anticipation amounted to a restraint on the alienability of the trust estate itself. It could also have said that the restraint on anticipation practically had the same effect as a restraint on alienation of the equitable interest, since the beneficiary probably would not be able to find a willing purchaser of his interest, or at least not one who would pay a price commensurate with its value.[46] In fact, the court in *Claflin* left open the question whether a voluntary or involuntary transferee of the beneficiary would take only the equitable interest subject to the same restraint on possession or would take possession of the trust property itself. Prior decisions had ordered termination in favor of involuntary transferees, indicating that alienation would cancel the restraint on anticipation.[47] But while a creditor might become entitled to possession, the court would not allow the beneficiary himself to anticipate possession of the trust property.

Paralleling the rapid acceptance of the Massachusetts spendthrift trust doctrine, the *Claflin* doctrine was subsequently adopted by a substantial majority of American jurisdictions.[48] It is now understood to mean that a trustee can be compelled to terminate the trust prematurely only if two requirements are met: (l) All beneficiaries consent to termination (and are legally capable of giving consent), and (2) premature termination would not jeopardize any "material purpose" of the trustor (i.e., any purpose other than providing for successive enjoyment of the trust property).[49]

2. *Doctrinal conflict: property and trust, law and equity.*

The American "dead hand" trust doctrines conflicted with the law of property at two levels. They immediately conflicted with analogous common law rules proscribing direct restraints on the alienability of legal interests. At a deeper level, they contradicted the whole course of doctrinal development of the common law of property during the nineteenth century by overtly deviating from the tendency to consolidate control over property interests in the hands of transferees. To be sure, beyond the law of restraints on

46. *See* Cleary, *Indestructible Testamentary Trusts*, 43 YALE L.J. 393, 400–01 (1934).

47. *See, e.g.*, Sanford v. Lackland, 21 F. Cas. 358 (C.C.D. Mo. 1871) (No. 12,312).

48. *See, e.g.*, Shelton v. King, 229 U.S. 90 (1913); Stier v. Nashville Trust Co., 158 F. 601 (6th Cir. 1908); *In re* Yates' Estate, 170 Cal. 254, 149 P. 555 (1915); DeLadson v. Crawford, 93 Conn. 402, 106 A. 326 (1919); Wagner v. Wagner, 244 Ill. 101, 91 N.E. 66 (1910).

49. RESTATEMENT (SECOND) OF THE LAW OF TRUSTS § 337 (1959).

alienation as such, there were notable deviations from this direction in the first part of the nineteenth century. Perhaps most obviously, at about the same time the English courts closed the list of recognized negative easements, equity developed a new form of encumbrance on land use, the equitable servitude, which soon allowed greater latitude in the creation of private land-use restrictions and had the effect of disaggregating control of land.[50] Within the law of restraints, strictly so called, however, the trend was toward furthering consolidation. In one sense, equity did deviate from that form simply by enforcing trusts. The trust form itself partially disaggregates the property bundle by separating management and beneficial use. But that degree of disaggregation could be tolerated because it presented no threat to alienability, the feature whose preservation was ostensibly most important. Other than with respect to exceptional interests such as married women's separate estates, both law and equity, in the United States and England, had denied that the power of disposition could be withheld from property interests. The spendthrift trust and *Claflin* doctrines deviated fundamentally from this practice of preserving the consolidated form of property.

That this doctrinal conflict occurred in the late nineteenth century seems particularly anomalous. The development of other related property doctrines in the Classical period accelerated the trend toward consolidation, thereby favoring the autonomy of the transferee. This was especially obvious with respect to the Classical Rule against Perpetuities, which was gradually formalized by courts and transformed into the rigid device that John Chipman Gray described in his influential 1886 treatise, *The Rule Against Perpetuities*.[51] Furthermore, late nineteenth century American legal thought is characterized by the conscious effort of courts and legal writers to synthesize legal doctrine, to eliminate internal conflicts and inconsistencies, and to transform American law from a collection of discrete and unrelated technical rules into a coherent body of doctrine organized around an integrated conceptual scheme.[52] An important element of this vision was ensuring genuine compatibility between equitable doctrines and

50. *See* note 22 *supra*.

51. J. GRAY, THE RULE AGAINST PERPETUITIES (1886). Gray's influence on perpetuities law is discussed in Siegel, *John Chipman Gray, Legal Formalism, and the Transformation of Perpetuities Law*, 36 U. MIAMI L. REV. 439 (1982).

52. *See* Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW 18, 23 (D. Kairys ed. 1982).

parallel doctrines of the common law. Compatibility was important not for its own sake but to ensure that no significant deviation would be made from the contractarian ideology of the common law. The consolidation tendency of property law was consistent with the ideology of freedom of contract that dominated English and American legal thought throughout most of the nineteenth century. In this sense, then, the new trust doctrines, which were certainly among the most conspicuous developments in the American law of trusts during the nineteenth century, deviated in effect if not intent, from the basic contractarian orientation of much of American private law of the period.

This is not to say that the developers of the new trust doctrines rejected established doctrines that invalidated direct restraints on legal interests or the tightened Rule Against Perpetuities, which invalidated "indirect" restraints on legal and equitable interests alike. Indeed, some courts saw no conflict between those rules and the new trust doctrines. Others who noticed a tension were unconcerned by it, feeling no compulsion to maintain symmetry between equitable doctrines relating specifically to trust interests and the other rules of the law of settlements, let alone property rules that did not deal with settlements as such.[53] Still, the American courts that accepted the spendthrift trust and *Claflin* doctrines clearly were rejecting the idea that property holders must be kept autonomous, for their objective was precisely to effectuate the intention of trust settlors to deny their beneficiaries' autonomy. At the same time, however, outside the world of trust settlements the courts still required that transferees of property be kept free of restraints and able to alienate their interests.

Those who opposed the *Broadway Bank* and *Claflin* decisions sensed that the new trust doctrines were in fundamental conflict with the rest of property law and that the law of settlements was now essentially schizophrenic. Their arguments, furthermore, revealed the paradoxical character of the debate over indestructible spendthrift trusts. John Chipman Gray's reaction to the new doctrines was nothing short of outrage:

> The law and the social morality which had established itself in England and in the most civilized parts of the United States during the earlier part of the present century was the comple-

53. *E.g.*, Lampert v. Haydel, 96 Mo. 439, 9 S.W. 780 (1888).

> tion of that great change wrought under the lead of English lawyers and English philosophers by which, in English speaking countries, mediaeval feudalism had given way to the industrial and commercial states of modern times.
>
> The foundation of that system of law and morals was justice, the idea of human equality and of human liberty. Every one was free to make such agreements as he thought fit with his fellow creatures, no one could oblige any man to make any agreement that he did not wish, but if a man made an agreement, the whole force of the State was brought to bear to compel its performance. It was a system in which there was no place for privileges,—privileges for rank, or wealth, or moral weakness. The general repeal of usury laws was the crowning triumph of the system.
>
> Now things are changed. There is a strong and increasing feeling, and a feeling which has already led to many practical results, that a main object of law is not to secure liberty of contract, but to restrain it, in the interest, or supposed interest, of the weaker, or supposed weaker, against the stronger, or supposed stronger, portion of the community. Hence, for instance, laws enacted or contemplated for eight hours' labor, for weekly payments of wages by corporations, for "compulsory arbitration," etc., that is, laws intended to take away from certain classes of the community, for their supposed good, their liberty of action and their power of contract; in other words, attempts to bring society back to an organization founded on status and not upon contract. To a frame of mind and a state of public sentiment like this, spendthrift trusts are most congenial. If we are all to be cared for, and have our wants supplied, without regard to our mental and moral failings, in the socialistic Utopia, there is little reason why in the mean time, while waiting for that day, a father should not do for his son what the State is then to do for us all.
>
> Of course, it would be absurd to say that the learned judges who have aided in the introduction of spendthrift trusts have been secret socialists; but it is none the less true, I believe, that they have been influenced, unconsciously it may well be, by those ideas which the experience of the last few years has shown to have been fermenting in the minds of the community; by that spirit, in short, of paternalism, which is the fundamental essence alike of spendthrift trusts and of socialism.[54]

Given Gray's own admission that the judges who developed the spendthrift trust and *Claflin* doctrines supported rather than opposed the principle of freedom of disposition, it seems curious to describe these doctrines as "socialistic." In a very real sense, however, Gray accurately captured the thrust of the doctrinal

54. J. GRAY, *supra* note 28, at viii–ix.

deviation by emphasizing its turn away from the tradition of preserving the autonomy of property holders towards a position whose effect is protective and hierarchical. The paradox is compounded by the fact that this effect was purported to be achieved on the basis of opposition to all collective regulation of property rights, including the power of disposition. Those who, like Gray, opposed the new doctrines and urged that courts deny the validity of the restraints imposed by settlors, thereby regulating the owner's private volition, professed to favor freedom of property as much as the deviationist judges did.

The paradoxical quality of the arguments in the trust debate indicated the extent to which the controversy implicated the fundamental contradictions in liberal property theory. The conflict that resulted from the doctrinal changes in trust law pushed these dilemmas to the surface and manifested them in doctrinal form. The level of controversy as well as the substance of the arguments made by both sides suggest that contemporaries were aware of how fundamental the doctrinal conflict was. What remains unexplained is why these theoretical dilemmas surfaced through changes in trust law in the late nineteenth century. The next section attempts to relate these doctrinal changes to the transition between two stages of legal consciousness in the nineteenth century. It argues that the doctrinal conflict resulted from and reflected dissonance in several related aspects of the conceptual structure of legal thought that replaced pre-Classical consciousness in the second half of the nineteenth century. These conceptual changes precipitated the theoretical dilemmas in the liberal model of property that had been mediated by characteristics of pre-Classical legal thought.

III. The Emergence and Failure of the Classical Synthesis

In this section I shall argue that the appearance and widespread acceptance of the deviationist trust doctrines represented the failure of an attempt to develop a Classical synthesis that would reconcile the internal contradiction in the freedom of disposition principle and render that principle coherent and determinate in all of private law, thereby truly integrating property and trust, law and equity. This synthesis failed ultimately because it did not and could not reconcile a conflict between two social visions and their two very different ways of defining the

"problem" of dead hand control of property. This conflict between social theories is widely apparent in modern discourse about dead hand issues,[55] but throughout much of the nineteenth century it was kept below the surface by certain elements of the conceptual apparatus of pre-Classical thought.

I shall first describe the essential characteristics of American legal thought about the dead hand question during the period roughly between 1800 and 1860, the pre-Classical period. I shall then outline the transition to Classical thought in the period after the Civil War, explaining the objectives and characteristics of the Classical synthesis. Finally, I shall discuss the tension between social visions that undermined general acceptance of the Classical theory, producing the doctrinal conflict between property and trust treatments of the restraints issue.

A. *The Dead Hand in Pre-Classical Thought, 1800–1860*[56]

This section provides a brief account of certain features of American legal discourse about property, the power of alienation, and its restrictions during the period roughly between 1800 and 1860, in order to establish the appropriate intellectual context for understanding the legal and equitable doctrines that were later rejected by the American courts. It attempts to provide a sketch map of the main contours of the conceptual geography of the dead hand question during the pre-Classical period when property and trust doctrines on that subject were compatible.

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55. Among the readings upon which I have relied as representative of postrealist discourse about the dead hand question are the following: R. CHESTER, INHERITANCE, WEALTH AND SOCIETY (1982); W. LEACH, PROPERTY LAW INDICTED (1969); L. SIMES, *supra* note 7; *How Far Should Freedom of Disposition Go?*, 26 REC. A. B. CITY N.Y. 8 (1971); Powell, *Freedom of Alienation—For Whom?*, 2 REAL PROP. PROB. & TR. J. 127 (1967).

56. The principal primary sources used in this section are: 1 W. CRUISE, A DIGEST OF THE LAW OF REAL PROPERTY (Greenleaf ed. 1856) (1st rev. abr. Am. ed. Boston 1849); 4 J. KENT, COMMENTARIES ON AMERICAN LAW (14th ed. Boston 1896) (1st ed. New York 1830); T. SKIDMORE, THE RIGHTS OF MAN TO PROPERTY! (New York 1829); 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA (14th ed. Boston 1918) (1st ed. Cambridge, Mass. 1836).

The principal secondary sources used are: P. ATIYAH, *supra* note 14; Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870–1920*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70 (G. Geison ed. 1983); Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1 (1977); Niles, *The Law of Estates Since Butler and Kent*, in 3 LAW: A CENTURY OF PROGRESS, 1835–1935, at 199 (1937); D. Kennedy, The Rise and Fall of Classical Legal Thought, 1850–1940 (1975) (unpublished manuscript).

Although the principle focus here is on American thought about the dead hand problem, one cannot avoid some consideration of English legal thought during the early nineteenth century since much of the conceptual apparatus that American lawyers used to rationalize the legal and equitable doctrines on restraints originated in English courts. There were, however, aspects of post-Revolutionary American thought about property that were self-consciously American and require a distinction to be drawn between English and American legal thought. These particularly involve the policy of alienability.

1. *Technicality vs. liberality, the New York statutory revision of the law of real property, and the rise of intentionality.*

A dominant characteristic of pre-Classical thought about property law generally and alienation in particular is the tension between "liberal" and "technical" legal rules.[57] This dichotomy pervaded early nineteenth century American legal discourse, appearing in countless judicial opinions and in texts as well, especially James Kent's influential *Commentaries on American Law*, the final volume of which deals with the law of real property. Liberality and technicality represented two contrasting ideals for organizing all of the property law. Furthermore, they generated the following sets of opposing terms, associated with technicality and liberality, respectively: feudal policy and commercial policy, English law and American law, law and equity. Most of the major developments within the law of property during the pre-Civil War nineteenth century can be understood in terms of the opposition between these sets of ideas. For the most part, an effort was made to replace the technical mode with the liberal mode, but the sentiment in favor of liberality was neither universal nor always consistent within the thinking of individual writers. Technicality, though generally disparaged, was sometimes found to be justified.

A striking example of the opposition between liberality and technicality was the famous systematic revision of the New York property statutes in the 1820s and 1830s.[58] Although particular

57. *See* D. Kennedy, *supra* note 56, at III–50–86.

58. The revisions were principally the work of Benjamin Butler, John Duer, who later became Chief Justice of the Superior Court of New York, and John Spencer. Chancellor Kent declined an appointment as reviser. The notes of the revisers may be found in *Notes of the Original Revisers of the Revised Statutes*, in R. FOWLER, THE REAL PROPERTY LAW OF THE STATE OF NEW YORK 1269–1320 app. (3d ed. 1909).

elements of the revised statutes were later neutralized by judicial interpretation and the scheme had only limited influence in other states,[59] the project as a whole does reflect the influence of the sentiment of liberality.

At the surface the New York revision appears to be a codification effort that rearranged and simplified large parts of real property law. One obvious objective of the codification effort was to enhance the transferability of land. For example, the rule aimed at preventing "suspension of the power of alienation,"[60] which was part of the statutory replacement for the English common law Rule Against Perpetuities, was obviously aimed at increasing land's mobility. So also were the provisions that declared all "expectant" estates (future interests) to be as fully transferable as presently possessory estates,[61] and the 1830 provisions shortening the perpetuities period by reducing the measuring lives from a "reasonable" number to two lives in being and eliminating the

59. *See* L. FRIEDMAN, *supra* note 28, at 211–12.

For a recent treatment of the New York Revised Statutes, see C. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 137–53 (1981). Cook's basic thesis regarding the significance of the project is hard to determine. While characterizing some reforms (for example, making all future interests fully alienable) as substantive and far-reaching, he minimizes the degree to which the reforms were innovative. *See id.* at 152. While it is difficult to determine exactly what effects followed (or would have followed, had judicial "interpretations" not diluted them) from the reforms, changes such as that with respect to trust law, the rule against suspension of the power of alienation, and the two-lives version of the Rule Against Perpetuities were clearly innovative and sparked strong controversy within the property bar. For a particularly strong expression of opposition to the property reform effort celebrating the common law rules of real property as "founded upon principles of mathematical truth" and attacking departure from those rules as "impl[ying] a subversion of true principles," see Note, *The Law of Real Property as Affected by the Revised Statutes of the State of New York,* 4 AM. L. MAG. 310 (1845).

On English changes in land law during the same period, see note 72 *infra*.

60. 1 N.Y. Rev. Stat. of 1829, pt. II, ch. I, tit. 2, art. 1, §§ 14–15. Gray treated the New York rule as a consequence of the mistaken notion that the common law Rule Against Perpetuities was itself a rule against restraints on alienation. His view which, of course, is now the conventional wisdom, was that the Rule was against remoteness of vesting and that the common law had no rule against suspension of the power of alienation, so that the New York statutory rule was totally unprecedented and ill-advised. (On the latter judgment as well, Gray's view is also the modern consensus.) J. GRAY, THE RULE AGAINST PERPETUITIES, 541–45 app. (2d ed. 1906). *See* Canfield, *The New York Revised Statutes and the Rule Against Perpetuities,* 1 COLUM. L. REV. 224 (1901).

For a treatment of the influence of the New York rule on statutory revisions in other states, see 5 R. POWELL, THE LAW OF REAL PROPERTY §§ 808–27 (P. Rohan rev. ed. 1984).

61. 1 N.Y. Rev. Stat. of 1836, pt. II, ch. I, tit. 2, art. 1, § 35. *See Notes of the Original Revisers of the Revised [New York] Statutes, supra* note 58, at 1277.

twenty-one year period in gross.[62]

The New York statutory revision was more than a mere exercise in housecleaning, however. For one thing, the revision is certainly connected to certain nonlegal ideas that were prominent in early nineteenth century American thought. Most promisingly perhaps, it can be argued that the reforms were generated by vestiges of a Whig republican ideology anxious to reconcile the values of civic humanism with progress.[63] Antebellum lawyers, like their counterparts during the Revolutionary era,[64] continued to believe that the American law of property, particularly those parts that concerned alienation, should be purged of its "feudal" aspects. This antifeudalism rhetoric, so prevalent in the legal writing of this period, was consistent with a republican view of allodial,[65] or freehold, land as a material basis for civic virtue.[66] Furthermore, by the end of the eighteenth century re-

62. 1 N.Y. Rev. Stat. of 1830 ch. 723, §§ 14–17, ch. 724 §§ 18–21. *See Notes of the Original Revisers of the Revised [New York] Statutes, supra* note 58, at 1278–80. The two-lives rule was repealed in 1958, and in 1960 the legislature added a twenty-one year period in gross.

63. On the republican ideology in American political thought, see J. POCOCK, THE MACHIAVELLIAN MOMENT 506–52 (1975). On civic humanism generally and the role of property therein, see J. POCOCK, *Civic Humanism and Its Role in Anglo-American Thought*, in POLITICS, LANGUAGE AND TIME, *supra* note 10, at 80. This essay, together with Pocock, *The Mobility of Property and the Rise of Eighteenth Century Sociology*, in THEORIES OF PROPERTY 141 (A. Parel & T. Flanagan eds. 1979) [hereinafter cited as Pocock, *Mobility*], provides an interpretation of thought about property during the period bracketed by Locke and Bentham that is an interesting alternative to that put forward in C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM (1962).

For a discussion of inheritance law reform during the Revolutionary era that sets it in relation to republican ideology, see Katz, *supra* note 56.

64. This is not to say that the republican element of antebellum property reform was entirely continuous with Revolutionary republicanism. To some extent the republican rhetoric of antebellum reform-minded lawyers grew out of the effort by elite members of the bar to prevent radical deprofessionalization of the legal system. *See* Gordon, Book Review, 36 VAND. L. REV. 431, 440–41 (1983) (reviewing C. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM (1981)).

65. The term "allodial" refers generally to ownership rights, rather than possessory interests that are subordinate to a superior. *See* Berkner, *Inheritance, land tenure and peasant family structure: a German regional comparison*, in FAMILY AND INHERITANCE: RURAL SOCIETY IN WESTERN EUROPE 1200–1800, at 77–78 (J. Goody, J. Thirsk & E. Thompson eds. 1976); *id.*, at 399 (glossary).

66. The sentiment that was expressed by this rhetoric during the first half of the nineteenth century, however, was, on the whole, not that of radical egalitarianism. Although occasional writings of this period, such as Thomas Skidmore's 1829 *The Rights of Man to Property!*, did continue the radical ideology of Revolutionary Era republicans such as Thomas Paine, the prevailing view favored reaction to the dead hand problem through reforms of the received common law. A solution to the evils associated with English land law did not require fundamental alteration of the basic model of individu-

publicanism was beginning to accept mobile property as necessary to achieving the "equality of property" that was the basis of an agrarian society instilled with civic humanist values.[67]

Without denying the influence of such ideas upon the reformation of property law, I wish to relate it instead to a specifically legal idea that was an essential component of pre-Classical consciousness.[68] This idea was to conceive of the dichotomy between liberality and technicality as a conflict between two "hostile systems"[69] that gave to the law of real property its unnecessarily "extensive and abstruse" character.[70] The revisers supposed that the intricacy and remoteness of the principles of property law, which they asserted to be greater than in any other area of law, was not justified by the nature of the subject but was owing to "peculiar causes":

> It is not a uniform and consistent system, complex only from the multitude of its rules, and the variety of its details; but it embraces two sets of distinct and opposite maxims, different in origin, and hostile in principle. We have first, the rules of the common law, connected throughout with the doctrine of tenures, and meant and adapted to maintain the feudal system, in all its rigor; and we have next, an elaborate system of expedients, very artificial and ingenious, devised in the course of ages, by courts and lawyers, with some aid from the legislature, for the express purpose of evading the rules of the common law, both in respect to the qualities and the alienation of estates, and to introduce modifications of property before prohibited or unknown. It is the conflict continued through centuries between these hostile systems, that has generated that affinity of subtleties and refinements, with which this branch of our jurisprudence is overloaded.
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> It is this conflict which seems to have involved the law of

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ated property. All that was required was to eliminate those "feudal" elements of real property law that impeded the mobility of land. *See, e.g.*, J. Adams, *A Dissertation on the Canon and the Feudal Law*, in 1 PAPERS OF JOHN ADAMS 103, 106 (R. Taylor, M. Kline & G. Lint eds. 1977). On the decidedly nonegalitarian aspects of Chancellor Kent's thought, see M. MEYERS, THE JACKSONIAN PERSUASION: POLITICS AND BELIEF 238–44 (1960).

67. *See* J. POCOCK, THE MACHIAVELLIAN MOMENT, *supra* note 63; Pocock, *Mobility*, *supra* note 63. The republican anti-aristocratic aspects of attacks on entails is also mentioned briefly in Cooper, *Patterns of Inheritance and Settlement by Great Landowners from the Fifteenth to the Eighteenth Centuries*, in FAMILY AND INHERITANCE: RURAL SOCIETY IN WESTERN EUROPE 1200–1800, *supra* note 65, at 193–96.

68. The concept of legal consciousness is developed in Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, in 3 RESEARCH IN LAW AND SOCIOLOGY 3 (S. Spitzer ed. 1980).

69. *Notes of the Original Revisers of the Revised Statutes*, *supra* note 58, app. III at 1290.

70. *Id.* at 1289.

> real property in inextricable doubt, whilst nearly in every case, as it arises, the uncertainty is, whether the strict rules of ancient law, or the doctrines of modern liberality are to prevail; whether effect is to be given to the intention, or a technical and arbitrary construction is to triumph over reason and common sense.[71]

This passage resonates with many of the themes that appeared again and again in antebellum American legal writing on the law of property,[72] and it illustrates the power that the theme of liberality in conflict with technicality exerted on legal thought about property law. Rigorous aspects of the common law, originally adapted to the preservation of the feudal system, had become only technical and arbitrary. Courts and lawyers have been compelled to develop artificial devices by which to evade these anomalies and achieve common sense results. The effect of this continual struggle was to create pervasive uncertainty. The objective of the statutory revision was to eliminate this uncertainty and to build a "uniform and consistent system" that eschewed the technicality of the ancient law in favor of doctrines of modern liberality.

What ultimately underlay the effort to restore property law to a liberal condition was a conception that the purpose of property rules was to give effect to private intentions. In this sense the New York statutory revision reflected the emergence of the will theory. The notion of liberality was bound up with the growing

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71. *Id.* at 1290.

72. That these themes were not peculiarly American is suggested by the fact that the New York revision was influenced, and at times explicitly patterned after, a contemporaneous effort to revise and codify English land law by James Humphreys, a respected conveyancing barrister. Humphreys, who associated with Austin and Bentham, developed the outline of a code. J. HUMPHREYS, OBSERVATIONS ON THE ACTUAL STATE OF THE ENGLISH LAWS OF REAL PROPERTY WITH THE OUTLINES OF A CODE 187–325 (1826). (To illustrate the need for reforming land law, Humphreys produced, in an appendix, forms then in use for conveyances, settlements, and other land transactions. *Id.* at 326. The length and complexity of these would not shock the twentieth century property lawyer.) Several features of this code were adopted by the New York revisers, who explicitly acknowledged their indebtedness. *Notes of the Original Revisers of the Revised Statutes, supra* note 58, at 1280, 1287, 1293, 1297–98, 1300, 1304, 1313. The revision of trust law which substantially eliminated private express trusts was particularly a common objective of the New York revisers and Humphreys. The revisers also acknowledged the influence of other English lawyer–reformers, including Lord Brougham and Sir Samuel Romilly, who in turn were influenced by Bentham. *See* Gregory, *Bentham and the Codifiers,* 13 HARV. L. REV. 344 (1900). For an excellent treatment of the Humphreys code, setting it in relation to the Benthamite codification approach to land reform, see A. OFFER, PROPERTY AND POLITICS 1870–1914, at 23–34 (1981) (a fascinating study of the land question in Victorian and Edwardian England).

emphasis on intentionality. The fundamental "mischief" of the ancient law of real property was its insistence that participants in private transactions conform their words and actions to the requirements of rigid and inflexible rules. Liberality reflected a conception that the function of legal rules was to place the legal system at the will of private parties, to fulfill individuals' intentions rather than to frustrate them. The point of reforming real property law, then, was to clear away the old rules that confounded intentions, creating a dynamic body of legal rules regulating land transactions.

The increasing emphasis on intentionality in the pre-Classical treatment of property law was frequently associated with discussion about the law/equity distinction, particularly as it bore upon the character of the law of trusts. We have already seen how the law of trusts in several respects reflected the difference between traditions of equity and the common law and how there were attempts throughout the course of the nineteenth century to assimilate equity with law, substantively as well as in the more obvious procedural sense. During the pre-Classical period American lawyers still considered equity to be the province of greater rationality. Equity was very commonly associated with liberality and the common law with technicality. The conflict was frequently related to differences between the law of trusts and the law of legal estates, approving equitable doctrines over their counterparts in the common law. The basis for this preference was trust law's allegedly greater responsiveness to private intentions, in contrast with the propensity of the common law to insist on using technical words to frustrate the will of the parties. Chancellor Kent's discussion of trusts in the *Commentaries* is typical:

> Trusts are now what uses were before the statute, so far as they are mere fiduciary interests, distinct from the legal estate, and to be enforced only in equity. Lord Keeper Henley, in *Burgess v. Wheate*, observed, that there was no difference in the principles between the modern trust and the ancient use, though there was a wide difference in the application of those principles. The difference consists in a more liberal construction of them, and, at the same time, a more guarded care against abuse. The *cestui que trust* is seised of the freehold in the contemplation of equity. The trust is regarded as the land, and the declaration of trust is the disposition of the land. But though equity follows the law, and applies the doctrines appertaining to legal estates to trusts, yet, in the exercise of chancery jurisdiction over executory trusts, the court does not hold itself

> strictly bound by the technical rules of law, but takes a wider range, and more liberal view, in favor of the intention of the parties. An assignment, or conveyance of an interest in trust, will carry a fee, without words of limitation, when the intent is manifest. The *cestui que trust* may convey his interests at his pleasure, as if he were the legal owner, without the technical forms essential to pass the legal estate. There is no particular set of words, or mode of expression, requisite for the purpose of raising trusts.[73]

While the theme of liberality and technicality dominated pre-Classical discourse, it must not be supposed that the sentiment favoring liberality was unqualified. There was a countercurrent which admitted that technical rules occasionally had a role to play and which was unwilling to accept absolute intentionality as a legal theory. This ambivalence was especially evident in Kent's *Commentaries*, which expressed skepticism about several of the New York reforms. For example, Kent was doubtful about the wisdom of abolishing the Rule in Shelley's Case, stating, "All the great property lawyers justly insist upon the necessity and importance of stable rules; and they deplore the perplexity, strife, litigation and distress which result from the pursuit of loose and conjectural intentions, brought forward to counteract the settled and determinate meaning of technical expressions."[74] Duncan

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73. 4 J. KENT, *supra* note 56, at *303–04.

74. *Id.* at *227. Russell Niles has suggested that Kent's opposition to the statutory abolition of the Rule in Shelley's Case may have resulted from his anticipation of the dilemma created for New York courts by the later rule developed in the infamous case of Moore v. Littel, 41 N.Y. 66 (1869), which held that a remainder limited in favor of the "heirs" of a living transferee of a presently possessory estate was vested in the presently living expectant heirs of the ancestor during the latter's lifetime. Niles, *supra* note 56, at 204. Although much litigation has resulted where, by statutory or judicial change (as in the case of the Doctrine of Worthier Title), the term "heirs", when used in limitations, has been treated as a word of purchase rather than of inheritance, Niles' explanation of Kent's motive is implausible and gives Kent too much credit. For one thing, abolition of the Rule in Shelley's Case merely meant that the heirs rather than their ancestor took the future interest, and under the new statutory rule making all future interests alienable, it was unnecessary to decide in *Moore v. Littel* whether that future interest was vested or contingent during the ancestor's lifetime. The doctrine of *Moore v. Littel*—which is addressed to that question of classification—was unnecessary to resolve the issue in the case. The "dilemma" of the doctrine was a consequence not of abolition of the Rule in Shelley's Case, at least not by itself, but of another statutory provision that defined the concept of vesting in such a way that it could lead to the "heresy" that the expectant heirs of a living person took a vested interest. Furthermore, the abolition of the Rule in Shelley's Case was vigorously opposed by property lawyers other than Kent. Their defenses of the Rule in Shelley's Case were not based on predictions of resulting constructional litigation but on the ground that the abolished rule was intended to, and did, fulfill "general intent" as opposed to "particular intent," and that property rules must

Kennedy has suggested that such statements do not indicate that Kent was simply opting for formality in the debate between technical "rules" and liberal "standards." Rather, Kent regarded liberality as a means, not as an ideal in conflict with technicality. Unlike the New York revisers, he did not think it realistic to attempt to abolish technicality altogether. "In other words, the ideal of liberality is a way to suppress the contradiction of formality and informality."[75]

What seems more immediately to have been the foundation for his reluctance to embrace all of the liberal reforms was a view of human nature that led to a sense of resignation regarding certain aspects of the ancient feudal law. This directly affected his views on the problem of dead hand control. This skepticism was particularly apparent in connection with his discussion of trusts. Incident to his romanticizing of equity in general, Kent expressed great admiration for the English institution of the trust, which he praised, in terms that are still very familiar, for its flexibility and capacity to adapt to unforeseen needs of families. This led him to oppose the major revisions of the law of trusts in the New York reforms.

The new statute provided for only three kinds of express trusts and a fourth category of constructive trust. This striking change was based on the claim that it would "sweep away an immense mass of useless refinements and distinctions; will relieve the law of real property, to a great extent, from its abstruseness and uncertainty, and render it, as a system, intelligible and consistent."[76] Kent felt that in their zeal to liberalize land law, the revisers had gone too far. He expressed admiration of the trust and his related ambivalence about an unqualified attack on the ancient system:

> I am very doubtful whether the abolition of uses, and the reduction of all authorized trusts to those specially mentioned, will ever be productive of such marvelous results. The apprehension is, that the boundaries prescribed will prove too restricted for the future exigencies of society, and bar the

always be based on carrying out the general intent even if they occasionally frustrate particular intent. In fact, defense of the Rule in Shelley's Case commonly reflected a commitment to the established rules of the common law as proved to be just and beneficient by their longevity alone. For an example of such a defense, see Note, *supra* note 59, at 310–18.

75. D. Kennedy, *supra* note 56, at III–68.

76. *Notes of the Original Revisers of the Revised Statutes, supra* note 58, at 1293.

> jurisdiction of equity over many cases of trusts which ought to be protected and enforced, but which do not come within the enumerated list, nor belong strictly to the class of resulting trusts. The attempt to bring all trust within the narrowest compass, strikes me as one of the most questionable undertakings in the whole business of the revision. It must be extremely difficult to define with precision, and with a few brief lines and limits, the broad field of trusts of which equity ought to have cognizance. The English system of trusts is a rational and just code, adapted to the improvements, and wealth, and wants of the nation, and it has been gradually reared and perfected by the sage reflections of a succession of eminent men. . . . It is in vain to think that an end can be put to the interminable nature of trusts arising in a great community, busy in the pursuit, anxious for the security, and blessed with the enjoyment of property in all its ideal and tangible modifications. . . . We cannot hope to check the enterprising spirit of gain, the pride of families, the anxieties of parents, the importunities of luxury, the fixedness of habits, the subtleties of intellect. They are incessantly active in engendering distinctions calculated to elude, impair, or undermine, the fairest and proudest models of legislation that can be matured in the closet, and ushered into the world, under the imposing forms of legislative sanction.[77]

Here Kent's opposition to the revision is not based on his view of the trust as a clear example of equity's liberal spirit, for he admits the practical relationship between private trusts and large accumulations of family wealth, a tendency that contradicted the egalitarian dimension of liberality. Nor was he merely asserting the ideological argument in favor of greater freedom for property owners to do with their wealth as they wished. His argument rather was that it was futile to try to eliminate such family fortunes completely by restricting the types of trusts that could be created. The pursuit of wealth to be maintained within the family through future generations—the dead hand instinct—was a fundamental aspect of human nature. By taking the spirit of possessive individualism as a given, Kent was able to absolve property law of any responsibility for encouraging or perpetuating an imbalance in the distribution of wealth. The law of property had to react to something more basic than mere politics: human nature.[78]

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77. 4 J. KENT, *supra* note 56, at *306–08.

78. I do not mean to suggest that Kent was the first legal writer to posit an innate human desire perpetually to control the use of property. Kent was rather drawing on a tradition that had been established generations earlier. In the eighteenth century, for example, the Scottish philosophical legal historians stressed this psychological factor

Overriding all other aspects of Kent's treatment of the liberal/technical dichotomy was its relation to a view of the history of property law as characterized by progressive evolution from the feudal policy to the modern, liberal policy. This historical thesis about the long-term trend of land law is one of the most conspicuous features of legal discourse about property in the first half of the nineteenth century.[79] By placing the ideals of liberality and technicality on a historical continuum, Kent and other writers muted the sense of conflict. Examining, albeit somewhat summarily, the historical theme will permit us to distill a conception of the alienability policy that developed among American lawyers during the pre-Classical period. We shall see later how this conception was altered in the Classical synthesis.

2. *The Historical Thesis and the Policy of Alienability*

The historical thesis of a commercial policy in opposition to and overtaking a feudal policy was not original to Kent or to nineteenth century American legal thought in general. Blackstone had postulated the same conflict. Kent's *Commentaries* certainly owed much to Blackstone, but it would be wrong to suppose that their usage of the same dichotomy had identical coloration. For despite their common terminology and the similarity of their classificatory schemes, important differences existed between the conceptual orientations of their treatments of the law of real property, leading to different focuses on the commercial policy. To understand the implications for Blackstone of the

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even more strongly than Kent did. Lord Kames explained the development of entails solely on the basis of the inherent dynastic urge:

> We thirst after opulence; and are not satisfied with the full enjoyment of the goods of fortune, unless it be also in our power to give them a perpetual existence, and to preserve them forever to ourselves and our families. This purpose, we are conscious, cannot be fully accomplished; but we can approach to it as near as we can, by the aid of imagination. The man who has amassed great wealth, cannot think of quitting this hold; and yet alas! he must die and leave the enjoyment to others. To colour a dismal prospect, he makes a deed, arresting fleeting property, securing his estate to himself and to those who represent him in endless . . . succession. His estate and his heirs must forever bear his name; every thing to perpetuate his memory and his wealth. How unfit for the frail condition of mortals are such swoln conception! The feudal system unluckily suggested a hint of gratifying this irrational appetite.

1 H. HOME (LORD KAMES), HISTORICAL LAW-TRACTS 217–18 (1758).

79. For a discussion of the treatment of this thesis by British legal historians in the generation that preceded Kent, see P. STEIN, LEGAL EVOLUTION: THE STORY OF AN IDEA 25–42 (1980).

progression from the feudal to the commercial policy, it is necessary first to have some sense of his categorical scheme.[80]

Blackstone had organized virtually all of what we now call private law according to a dichotomy between status and property, "the law of persons" and "the law of things." Of the two, the latter was far broader and more inclusive, encompassing much of what we now think of as tort and contract. The division basically reflected a distinction between two sets of legal relations: person-to-person relations (the law of status) and person-to-thing relations (the law of property).

This distinction and the person-thing relations conception are closely linked to Blackstone's thesis of evolution from the feudal policy to the commercial policy.[81] Feudalism was used as a foil, to define the commercial policy in terms of what it was not. To Blackstone, the policy of medieval land law was to maintain a social system of hierarchy and "servility," in which control of land was derived from the status of individuals in a legally enforced hierarchy of personal obligations. Blackstone described the historical process as one of "redemption" from a "complete and well-concerted . . . scheme of servility" to "that state of liberty, which we now enjoy."[82] He explicitly emphasized abolition of restraints on alienation as a crucial element of this process, stating, "by degrees this feudal servility is worn off, and experience hath shown, that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are totally free and unrestrained."[83] In rejecting the feudal policy, however, Blackstone was not suggesting that the medieval common law had been maladaptive. On the contrary, his view was that the feuds had replaced pre-feudal "allodial" land, which was the "natural condition," with feudal land as a rational response to the peculiar needs of the time, particularly self-preservation. But as those conditions had long since disappeared, the common law had "restored" allodial land in response to the modern commercial policy.

The commercial policy liberated individuals from a fixed net-

80. For the following discussion I have relied extensively on Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 313–46 (1979).

81. Donald Elliott has recently discussed how the idea of evolution generally forms the basis of a tradition in American legal scholarship. Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38 (1985).

82. 4 W. BLACKSTONE, COMMENTARIES *420.

83. 2 *id.* at *288.

work of social relations and land from its captivity as status-based. It replaced a conception of ownership in terms of limited use-interests with a conception of absolute dominion. More precisely, it eliminated a system of social control in favor of the "restoration of Saxon liberty." In other words, the triumph of the commercial policy over the feudal policy represented a subordination of the social dimension of property and a denial of the opposition between individual freedom and state power. The notion of property as a person-to-thing relation was a crucial device. It converted social relations into relations to things, obscuring the issue of owner-state and owner-nonowner relations. For Blackstone, then, the purpose of the focus on the feudal/commercial policy dichotomy was to prove (and approve) the dismantling of social control, avoiding the problem of the conflict between the will of individual owners and the concerns of the community.

Pre-Classical American writers continued to assert the Blackstonian thesis that the history of property law had direction. Kent, for example, borrowed from Blackstone the view that "allodial" land was historically the natural condition and had been displaced in response to the need for greater military and personal security. But American writers were even more emphatic about the historical development of the policy of alienability. The republican ideology was a catalyst for this theme, as Kent's *Commentaries* indicated:

> Entailments are recommended in monarchical governments, as a protection to the power and influence of the landed aristocracy; but such a policy has no application to republican establishments, where wealth does not form a permanent distinction, and under which every individual of every family has his equal rights, and is equally invited, by the genius of the institutions, to depend upon his own merit and exertions. Every family, stripped of artificial supports, is obliged, in this country, to repose upon the virtue of its descendants for the perpetuity of its fame.[84]

The logic of the historical thesis allowed American lawyers to regard property law in the United States as still further along the continuum toward modernity and the commercial policy. For, as Kent saw it, land here had always been "allodial." This vision had an important consequence for the pre-Classical conception of the policy of alienability. The policy was expressed in essen-

84. 4 J. KENT, *supra* note 56, at *20.

tially reactive terms; that is, it was stated in terms of what it was not, rather than in terms of what it affirmatively was. It stood for the opposition between "feudal" England and "modern" America, and it was associated with the American cleansing of those features of real property law that were characteristic of English aristocracy. The "Gothic system" played no appreciable role in the United States, as it did in England. Kent stated that here "none of the inconveniences of tenure are felt or known."

> We have very generally abolished the right of primogeniture, and preference of males, in the title by descent, as well as the feudal services, and the practice of subinfeudation, and all restraints on alienation.[85]

It was characteristic of pre-Classical discourse to associate alienability with the common law's abhorrence of "perpetuities." This term, as the pre-Classicalists used it, was frustratingly ambiguous in meaning. Its modern usage, which is directed at the question of remotely vesting future interests, was not well established in the early nineteenth century.[86] Rather than use it as a term of art in connection with a particular problem, there was a tendency to continue the old usage and apply it to an array of settlement arrangements that were "inconvenient." By the beginning of the nineteenth century, however, "inconvenience" was being equated with immobile property. There was also a further tendency to associate "perpetuities" with entailments, which, as we have seen, were considered to be aristocratic. These tendencies were indicated, for example, by Kent's discussion of "executory devises":

> The history of executory devises presents an interesting view of the stable policy of the English common law, which abhorred perpetuities, and the determined spirit of the courts of justice to uphold that policy, and keep property free from the fetters of entailments, under whatever modification or form they might assume. Perpetuities, as applied to real estates, were conducive to the power and grandeur of ancient families, and gratifying to the pride of the aristocracy; but they were extremely disrelished by the nation at large, as being inconsistent with the free and unfettered enjoyment of property. "The reluctant spirit of English liberty," said Lord Northington, "would not submit to the statute of entails; and Westminster hall, siding with liberty, found means to evade it." . . . Such

85. *Id.* at *670.

86. In Russell Niles' happy expression, "A perpetuity was abhorred long before it was defined." Niles, *supra* note 56, at 199, 217.

> perpetuities, said Lord Bacon, would bring in use the former inconveniences attached to entails; and he suggested that it was better for the sovereign and the subject, that men should be "in hazard of having their houses undone by unthrifty posterity, than to be tied to the stake by such perpetuities."[87]

By treating the problem of restraints through such historical connections, the pre-Classicalists did not directly face the task of developing an articulated and coherent policy of alienability that organized the various rules dealing with restraints. They were content to present alienability simply as an aspect of the progression of the common law. There was no effort to systematize the law of restraints, which was dealt with in a piecemeal fashion. This gave the alienability policy a vague quality. No attempt was made to specify what aspect of "property" was to be kept fully alienable, which would have suggested the positive value of alienability. Only later was an ambiguity revealed when the Classicalists did attempt to articulate the precise content of the historical policy favoring alienability.

There was one aspect of their treatment of alienability, however, on which the pre-Classicalists were more definite. They expressly acknowledged that the policy favoring alienability was an exercise of state power restricting the scope of individual freedom of alienation. While they did reconceive of property law as a mechanism for the exercise of private will, they also recognized that individual intent was subject to limitations that the state might prescribe in pursuit of broader interests of the community.

The remarkable feature of pre-Classical thought is that even while it acknowledged state power as a qualification on individual freedom of disposition, it was basically free of any sense of tension. The pre-Classicalists did not express the issue of regulation of alienation in terms of a conflict between the will of the individual owner and that of the state. Nor was there any apparent recognition of indeterminacy in the notion of freedom of alienation. The logical contradiction in permitting freedom of disposition to both present and future property owners, requiring a choice between donor and donee, was simply not recognized.

The lack of a sense of tension or ambiguity was due to the existence in the early nineteenth century conceptual apparatus of devices that rationalized legal restrictions upon the power of disposition in nonpower and nonwill terms. These devices were a

87. 4 J. KENT, *supra* note 56, at *264.

favorite target for debunking by Realist writers in the 1930s and 1940s (though, as we shall see,[88] they were actually demolished earlier by Classical writers such as Gray near the end of the nineteenth century), but in pre-Classical legal consciousness they were more than rhetorical evasions of the dilemmas we now experience. They constituted an organic component of the pre-Classical amalgam of conceptual and policy-based reasoning. The next section examines these devices and their role in avoiding doctrinal conflict between property and trust treatments of restraints on alienation.

3. *Conceptualism and the repugnancy theory.*

The major analytical problem for pre-Classical thought concerning restraints on alienation was how to reconcile the view that the common law's "constant" policy was increasing the freedom of individuals to alienate their land as they wished, with the felt need to prohibit individual owners from imposing restraints upon recipients of transferred property. At bottom, the pre-Classics never really faced this problem. Rather they obscured it through reasoning that ignored important distinctions while drawing other distinctions that were thereafter dismissed by Classical writers. This reasoning indicates the extent to which the pre-Classical structure of legal thought combined conceptualism with the instrumentalist thrust of the growing emphasis on "policy."

It was characteristic of pre-Classical discussions of restraints on alienation to depict courts as the historical protectors of individual freedom of alienation. This view provided a sense of continuity and identity between two quite different problems. Judicial efforts to block devices imposed by individual owners to tie up land within their families were portrayed as continuous with decisions that undermined the feudal restraints imposed by sovereigns on private holders of land. No clear distinction was drawn between the two different sources of restraints on alienation—state and individual. Consequently, there was no recognition of the fact that different parties were involved in the two situations—in the first, present holders, whose power to transfer was recognized as a result of dismantling the system of feudal restraints, and, in the second, recipients, whose power to alienate

88. *See* text accompanying notes 99–124 *infra.*

involved sacrificing the liberty of property of past owners. By grouping together both sources of restraints as threats to "individual liberty," pre-Classical thought avoided recognizing the fundamental contradiction in the ideal of freedom of disposition.

The feature of pre-Classical legal analysis that was most important in rationalizing the doctrines that prohibited direct restraints on alienation was the repugnancy theory. According to this theory direct restraints on alienation are void because "the power of alienation is necessarily and inseparably incidental to an estate in fee."[89] The restraint, being "repugnant" to the "nature" of the interest in question, is void, not because of a policy choice, but because the inherent characteristics of the affected interest require it to be so. This argument was repeated in countless opinions and texts throughout the first part of the nineteenth century and continued to appear even in the twentieth century.[90] Kent's treatment of the theory is again illustrative of the antebellum mode. Kent purported to draw upon an ancient principle, one frequently attributed to Coke. He stated: "Conditions are not sustained when they are repugnant to the nature of the estate granted, or infringe upon the essential enjoyment and independent rights of property . . . . Such restraints were held by Lord Coke to be absurd, and repugnant to reason . . . ."[91] By Kent's time the repugnancy notion had a much wider place in legal thought than merely in the conception of the fee simple. Alienability was made an inherent characteristic of property in general, so that any interest that was classified as being property, even those that fell short of a fee simple and those that were not in land, could be viewed as inherently alienable. [92]

The repugnancy notion made it possible for pre-Classical lawyers to assert without contradiction both that the function of property was to carry out the will of the individual owner and that restraints imposed by owners were void. For the theory built upon a crucial distinction between freedom to dispose of property and freedom to define it.[93] The former was conceded; the

89. Brown, *Spendthrift Trusts,* 54 CENT. L.J. 382, 383 (1902).

90. *E.g.,* Potter v. Couch, 141 U.S. 296 (1891); Northwest Real Estate Co. v. Serio, 156 Md. 229, 144 A. 245 (1929); Hutchinson v. Maxwell, 100 Va. 169, 40 S.E. 655 (1902).

91. 4 J. KENT, *supra* note 56, at *131.

92. *See* Bordwell, *Alienability and Perpetuities II,* 23 IOWA L. REV. 1, 11–14 (1937).

93. For a clear statement of this view, see Manning, *The Development of Restraints on Alienation since Gray,* 48 HARV. L. REV. 373, 401–02 (1935).

latter, denied. The rationalizing technique was to envision different spheres of authority between the individual and the state. As to the disposition of property, the rules of property law are only facilitative, designed to implement the owner's intentions. But as to the definition of property, legal rules are regulative, prescribing the nature of estates:

> The intention of the testator is the first and great object of inquiry; and to this object technical rules are, to a certain extent, made subservient. . . . The control which is given to the intention by the rules of law, is to be understood to apply, not to the construction of words, but to the nature of the estate—to such general regulations in respect to the estate, as the law will not permit. . . . To allow the testator to interfere with the established rules of law, would be to permit every man to make a law for himself, and disturb the metes and bounds of property.[94]

The repugnancy theory provided the conceptual foundation for the substantive compatibility between trust and property treatments of dead hand issues, particularly as to the problem of restraints, during the pre-Classical period. The English doctrine of *Brandon v. Robinson* had transplanted the theory from the law of property, where it had previously been developed to invalidate most restraints on legal estates, into the law of trusts. By the time of that decision Equity was well down the road to viewing the trust beneficiary's interest as an estate, fully analogous to the legal estates which were subject to the established rules against restraints. The degree of assimilation between legal and equitable estates was such that Lord Eldon was able to assert the applicability of the repugnancy theory to restraints on trust interests as given: "[I]f the property was given to the . . . [beneficiary], it must remain subject to the incidents of property . . . ."[95]

American decisions prior to 1875, with few exceptions, reflect the same commitment to the repugnancy theory. Cases adhering to the *Brandon* doctrine relied upon the repugnancy theory, either alone or bolstered by appeals to the historical policy of alienability.[96] The recurrent argument was that *jus disponendi*, the power of disposition, is inherently included in a gift of a thing.

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94. 4 J. KENT, *supra* note 56, at *534–35.

95. Brandon v. Robinson, 18 Ves. Jun. 429, 434, 34 Eng. Rep. 379, 381 (1811).

96. *E.g.*, Smith v. Moore, 37 Ala. 327 (1861); McIlaine v. Smith, 42 Mo. 45 (1867); Hallett v. Thompson, 5 Paige Ch. 583 (N.Y. Ch. 1836); Mebane v. Mebane, 39 N.C. (4 Ired. Eq.) 131 (1845); Tillinghast v. Bradford, 5 R.I. 205 (1858); Heath v. Bishop, 25 S.C. Eq. (4 Rich. Eq.) 46 (1851). The Alabama court in Smith v. Moore dismissed the

The same conceptualism was present in the pre-Classical mode of analyzing a trust beneficiary's power to terminate the trust against provisions postponing possession. Both English and American courts analyzed the enforceability of such restraints on alienation in terms of the nature of the petitioner's interest. The basis for the English doctrine of *Saunders v. Vautier*, which had a wide following in the United States prior to the *Claflin* decision, was that an individual or a group of individuals who hold all beneficial interest in a trust estate are free to take possession of it because they hold an "absolute indefeasible interest," an equitable fee, the nature of which is that it is subject to their disposal.[97] The trust settlor simply lacked the power to affect the characteristics of property, legal or equitable.

B. *The Classical Synthesis*

Pre-Classical legal thought avoided directly confronting the dilemmas of the principle of freedom of disposition because of its use of analytical tools that obscured its ambiguities and mediated its inherent contradiction. The crucial ambiguities concerned first, the policy of alienability and second, the ultimate goal of the historical struggle of common law judges to protect individual freedom of disposition. With respect to the policy of alienability, the repugnancy theory made it unnecessary to define precisely the sense in which "property" had to remain alienable, whether as title to some asset, or as all interests treated as property, including equitable interests. Because the repugnancy theory did not require a choice between these two particular conceptions of property, which the alienability policy supplies with different contents, it avoided any potential conflict between legal and equitable views on this subject.

The second source of ambiguity, the specific objective of the historical effort to promote freedom of alienation, resulted in the lack of a positive theory of legitimacy of legal control over the power of disposition. By depicting courts as continually struggling against all attempts to abridge the natural right of alienation, both restraints derived from the sovereign and those

early Pennsylvania decisions as "mak[ing] a palpable innovation upon the law . . . ." *Smith*, 37 Ala. at 331.

97. *See* Smith v. Harrington, 86 Mass. (4 Allen) 566 (1862); Bennett v. Chapin, 77 Mich. 526, 43 N.W. 893 (1889); Philadelphia v. Girard, 45 Pa. 9, 27 (1863); Thom's Ex'r v. Thom, 95 Va. 413, 28 S.E. 583 (1897). *But see* Rhoads v. Rhoads, 43 Ill. 239 (1867).

originating in the actions of private owners, the pre-Classicalists obscured the ultimate message of history: Was it to protect the freedom of the owners from state-imposed restrictions or to protect the freedom of recipients from all restraints, including those imposed by previous owners? This uncertainty meant that pre-Classical thought failed to provide a coherent theory of legal regulation of the power of alienation.

These ambiguities surfaced in the late nineteenth century as a result of changes in legal thought that eliminated the mediating features of pre-Classical legal analysis.[98] Specifically, Classical thinkers discredited the repugnancy thesis as analytically unsound and shifted attention away from history and anti-feudal rhetoric in favor of a positive theory of freedom of disposition. Legal writers of the late nineteenth century attempted to build upon the discredited foundations of pre-Classical thought and to replace its fragmentary approach to dead hand issues with an integrated conceptual scheme that would unify all of the law of restraints and bring coherence to the principle of freedom of disposition.

This grand design failed even as it was being articulated by such well-known writers as John Chipman Gray. The appearance and eventual spread of deviationist trust law doctrines signaled not only a schism between legal and equitable doctrines but, more generally, indeterminacy in the freedom of alienation ideal and a fundamental conflict between social visions. In this section I describe the differences between the Classical and pre-Classical legal approaches to the problem of restraints on alienation and then discuss the dissonances within Classical thought that led to the doctrinal conflict.

1. *Gray's unitary standard.*

Legal opinions and texts of the late nineteenth century show much less concern with the problem of technicality in the law of property than was present in pre-Classical discourse. The emphasis was rather on replacing the fragmentary approach of pre-Classical lawyers with a unified, systematic treatment of the problems of restraints on alienation, both "indirect" and "di-

98. On the transition between pre-Classical and Classical American legal thought generally, see Kennedy, *supra* note 56; Mensch, *supra* note 52.

rect."[99] The striking innovation of the Classical approach to the problem was to conceive of the conflict between sovereign and individual wills as a single problem, capable of unified treatment. Gray's treatise, *Restraints on the Alienation of Property*, first published in 1883, was representative of this approach.[100]

In the Preface to the First Edition, Gray stated that the treatise was "the first attempt . . . to deal systematically with the whole of a legal doctrine, whose development is . . . in danger of being marred by too exclusive an attention to particular aspects."[101] This objective and his view that the fragmentation of legal doctrine was the source of doctrinal errors were reinforced early in the text:

> Such errors as have arisen in discussing restraints on alienation are largely due to the subject having been dealt with disconnectedly. If the restraint was in the form of a condition, it was treated with conditions. If it was in the form of a direction to a trustee, it was treated with trusts. Involuntary alienation, or liability for debts, has been considered without reference to voluntary transfers. It will be a gain to clear thought to bring the whole subject together.[102]

Bringing "the whole subject together" led Gray to speak of a unitary "rule against restraints on alienation," whose particular applications he intended to set out and explain. It was, however, on

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99. The grand vision of systematized doctrine was expressed by Gray in the Preface to the First Edition of *The Rule Against Perpetuities*:

> I have long thought that in the present state of legal learning a chief need is for books on special topics, chosen with a view, not to their utility as the subjects of convenient manuals, but to their place and importance in the general system of the law. When such books have been written, it will then, for the first time, become possible to treat fully the great departments of the law, or even to construct a *corpus juris*.

J. GRAY, THE RULE AGAINST PERPETUITIES iii (1st ed. 1886).

One of the consequences of his book on the Rule was that the "problem" of (direct) restraints on alienation and the "problem" of perpetuities were set off from each other, so that remotely-vesting future interests—Gray's conception of the problem of the Rule—are sometimes referred to as "indirect" restraints on alienation. His revelation concerning the distinction is discussed in the same Preface. *Id.* at iv.

100. J. GRAY, *supra* note 28, at xiii. My focus on Gray's book is premised on the view that, in certain cases, a particular single text expresses "a unique awareness of the values and conventions, and 'implicational' and 'latent' meanings, of the culture in which it was written, and thus singlehandedly might be used to explain much of that culture." Wood, *Intellectual History and the Social Sciences*, in NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY 27, 40 n.26 (J. Higham & P. Conkin eds. 1977). Gray's *Restraints* is such a text.

101. J. GRAY, *supra* note 28, at xiii.

102. *Id.* § 7, at 4–5.

the applicability of this rule to equitable interests that Classical legal thought deviated from pre-Classical.

Gray reorganized doctrines concerning restraints by fundamentally restructuring legal analysis of the problem. While Kent had conflated public and private restraints, Gray distinguished them and focused attention on those imposed by the exercise of private volition. Second, Gray and other Classical lawyers greatly deemphasized the theme of technicality versus liberality, although they by no means abandoned the historical thesis of property law's progressive evolution.[103] Third, perhaps reflecting the growing dominance of a positivist conception of property,[104] Classical thinkers rejected the repugnancy notion as "a notion which savours of metaphysical refinement rather than of anything substantial . . . ."[105] Rather than suppressing the conflict between individual will and collective will through such conceptualisms, Gray directly confronted it. The only question was whether or not private intentions violated "public policy." The characteristics of Classical analysis are evident in the following passages from Gray's treatise:

> With some exceptions . . . the rights which are by nature assignable may be transferred, if not at law, at least in equity. If there are any restraints on their free alienation, such restraints are not imposed on them by public policy, but by the will of those persons who have created or transferred them. It is the purpose of this essay to consider . . . with what limitations, if any, does the law say, "It is against public policy to allow restraints to be put upon transfers which public policy does not forbid."[106]

Gray's book vibrates with this conflict. Throughout he emphasizes that, prima facie, property rules have as their objective the fulfillment of private intentions. The only basis that justifies

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103. *See* §§ 4–6*a*, at 2–4. On the theme of evolution in American legal thought, see Gordon, *Critical Legal Histories,* 36 STAN. L. REV. 57, 59–67 (1984); Gordon, *Historicism in Legal Scholarship,* 90 YALE L.J. 1017, 1040–44 (1981). An excellent study of the idea of legal evolution in nineteenth century British legal thought is P. STEIN, LEGAL EVOLUTION (1980). On the theme of evolution in Victorian social thought generally, which was influential upon such leading Classical American legal figures as Holmes, Gray, and Ames, see J. BURROW, EVOLUTION AND SOCIETY: A STUDY IN VICTORIAN SOCIAL THEORY (1966).

104. For a discussion of Gray's positivist legal theory, developed in his famous work on jurisprudence, *The Nature and Sources of the Law,* see MacCormick, *A Political Frontier of Jurisprudence: John Chipman Gray on the State,* 66 CORNELL L. REV. 973 (1981).

105. Watkins v. Williams, 3 Mac. & G. 622, 629 (1851), 42 Eng. Rep. 400, 403 (1904).

106. J. GRAY, *supra* note 28, § 3, at 2.

blocking such intentions is public policy or "advantage": "The process of civilization consists in the courts endeavoring more and more to carry out the intentions of the parties or restraining them only by rules which have their reason for existence in considerations of public policy."[107] In this respect the Classical synthesis represented an extension of the will theory which had its roots in pre-Classical thought, raising it, however, to a higher level of abstraction so that it encompassed all problems arising in private transactions.

The Classical synthesis attempted, then, to resolve the conflict between private and public will through an abstraction, public policy. Once "the rule" against private restraints on alienation had been grounded in public policy, the task was simply one of working out, by a process of deduction, its specific implications as the conflict arose in relation to different types of restraint—disabling, forfeiture, and promissory—and different estates—fee interests, life estates, and terms of years. The policy itself, moreover, was derived from a "principle" that was objectively established through historical study of English and American case authority, which was assumed, in a continuation of pre-Classical thought, to have direction. For Gray, this principle was quite simple: "Whatever rights . . .in property a man has, those rights are alienable."[108] One is left with the overall impression of an integrated rule structure that is coherent and objective.

The attempt to synthesize the law of restraints grew out of the late nineteenth century conception of legal rights.[109] According to this conception, legal rules serve to define spheres of autonomy for social actors, separating individual from state, and individuals from each other. Legal rules create boundary lines behind which individuals have absolute rights and are free to act without fear of legal sanctions. The resolution of disputes depends upon a determination of which actor has crossed the boundary and invaded another's sphere. Abstract and general legal principles are thus the source of individual freedom and legal equality.

The importance of this scheme for the law of property was to

107. *Id.* § 74*b*, at 66.

108. *Id.* § 166, at 151.

109. The following account draws from D. Kennedy, *supra* note 56; Mensch, *supra* note 52; and Gordon, *supra* note 56. For a lucid discussion of the same enterprise in England, see Sugarman, *The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science* (Book Review), 46 MOD. L. REV. 102, 106–110 (1983).

make the power of alienation a matter of individual right. The emphasis on the rhetoric of rights in Classical discourse about alienation generated, however, a crucial ambiguity. Whose right of alienation was the law of property protecting? This ambiguity was squarely presented when donors transferred property subject to restraints so that recipients would be unable to transfer their interests voluntarily and their creditors would likewise be unable to attach the restrained interests in order to satisfy debts.

Gray's perspective was that ownership must remain consolidated and that transfers of the consolidated bundle should be neat, clean breaks with no continuing entanglements between donor and donee. This perspective not only supported the extant doctrines of property law concerning restraints on legal interests but also extended to equitable interests. For Gray saw no reason to distinguish between legal and equitable interests. Indeed, a fundamental part of his effort to synthesize the law of restraints was complete integration of legal and equitable doctrines, cutting across the categorical line between the property law, strictly so-called, and the trust law. Gray considered that this integration had already been substantially achieved in English and American case law. He attempted to demonstrate this by a detailed review of the relevant decisions. His introduction to this review is illuminating:

> The desire that property shall be kept in a man's family, and that his descendants shall enjoy it, while their creditors shall not, is a feeling against the manifestations of which the law has contended for centuries. This desire prompted the feudal lords to pass the statute De Donis in the thirteenth century; and in recent times it has induced attempts to create inalienable life interests, generally by the transfer or devise of property to trustees in trust to apply the income for the support and maintenance of the persons intended to be benefited, without its being liable for their debts. We have now to see how far, if at all, by such or other devices, persons have succeeded in creating inalienable rights.[110]

In this chronological survey of English and American cases dealing with disabling restraints upon equitable life interests Gray was anxious to prove that the doctrine of *Brandon v. Robinson* had been established even before Eldon's decision.[111] For the argument had been made in influential American cases recog-

110. J. GRAY, *supra* note 28, § 143, at 140.

111. *See* text accompanying notes 22–25 *supra*.

nizing the validity of such restraints that the English trust law doctrine was an innovation attributable to Eldon's notorious views. In his famous dictum in *Nichols v. Eaton*, Justice Miller stated: "This doctrine [of *Brandon v. Robinson*] is one which the English Chancery Court has ingrafted upon the common law for the benefit of creditors, and is comparatively of modern origin."[112] Gray responded:

> The decisions of the English Chancery which have been cited do not set forth, as has sometimes been hinted, any novel doctrines. They are simply applications of a principle older than *Taltarum's Case*. They are a part of the struggle of the law against feudalism, and against the attempt to give the enjoyment of wealth without its responsibilities. They are modern only because the special form of dishonesty, family pride, and sentimentalism at which they are aimed is modern.[113]

This disagreement over precedent reflected a deeper conflict over the meaning of the history of Anglo-American property law and its implications for future developments. Gray linked restraints upon equitable interests with the old struggle against feudal restraints in an attempt to establish that the point of history was to preserve the power of alienation for recipients. *Nichols v. Eaton* and the other early spendthrift trust cases signaled a new stage in the development. They reflected the view that feudal hierarchy had long since been eliminated and that the historical message that is relevant to modern conditions is the right of owners to do with property as they wished, including the power to make gifts on such terms as to assure that the gifts are not undone. From the perspective of these judges, then, Gray's view was old-fashioned and illiberal.

2. *The deviationist trust doctrines.*

The proponents of the spendthrift trust and *Claflin* doctrines did not reject the principle relied upon by Gray. But they denied its relevance to equitable interests. With the repugnancy theory discredited, they saw no incompatibility between the rule that restraints on legal interests were invalid and holding that the same restraints could effectively be placed on equitable interests. Public policy did provide limits on the power of disposition, but these did not affect equitable interests whose alienability had

112. 91 U.S. at 725.

113. J. GRAY, *supra* note 28, § 168, at 161–62.

been withheld by a settlor. For example, in *Nichols* Justice Miller observed:

> We concede that there are limitations which public policy or general statutes impose upon all dispositions of property, such as those designed to prevent perpetuities and accumulations of real estate in corporations and ecclesiastical bodies. We also admit that there is a just and sound policy peculiarly appropriate to the jurisdiction of courts of equity to protect creditors against frauds upon their rights, whether they be actual or constructive frauds.[114]

In no sense did judges such as Justice Miller consider that approval of the spendthrift trust and *Claflin* doctrines represented a deviation of equitable from legal doctrine.[115] They certainly agreed with Gray that equity must follow the law[116] and that the validity of privately imposed restraints was strictly a matter of public policy, not to be determined by metaphysical notions such as "repugnancy." And they agreed that the fundamental policy governing property and trust law was alienability. But the abstract policy of alienability was ambiguous.

There were two related aspects to this ambiguity— the dimensions of the property concept to which the alienability policy applied, and the positive value to be achieved by alienable property. Different conceptions of property were linked to different conceptions of alienability. Property might be conceived of in terms of title to some particular thing. The purpose of the policy of alienability tied to this conception is to keep that thing in the stream of commerce.[117] This conception of alienability rests on the view that the market form of economic organization itself necessitates a legal policy of alienability. Alternatively, property might be conceived of in a more "scientific"[118] sense as including but not being limited to title: All legally protected rights to use or enjoyment constitute property. This broader conception

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114. 91 U.S. at 725.

115. The classic account of Justice Miller's thought remains C. FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 1862–1890 (1939).

116. To be sure, there were occasional indications of the opposing view, that equity was free to develop its own rules for its own interests and that these rules might vary from common law rules. For one example, see Lampert v. Haydel, 96 Mo. 439, 9 S.W. 780 (1888). But such expressions were rare.

117. *See* Scott, *Control of Property by the Dead. II.*, 65 U. PA. L. REV. 632, 643–44 (1917).

118. *Cf.* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977) (the notion of "scientific" legal analysis is based on the use of a specialized language and a set of technical concepts).

grows out of a view of alienability that is grounded in an ideology of individual autonomy.

Restraints imposed on legal interests provided no occasion for this ambiguity to surface. Since legal interests are fully consolidated, including both management (title) and enjoyment, both senses of alienability were involved in the common rule against restraints. But the trust form itself created difficulties by its characteristic separation of management from enjoyment. Pre-Classical legal analysis avoided the problem through the repugnancy theory. The abandonment of that device in the Classical period permitted the ambiguity to surface.

Proponents of the new trust doctrines conceived of alienability as keeping the underlying subject matter of the gift mobile. This title-based conception permitted, for example, the court in *Broadway National Bank v. Adams*[119] to adopt the following reasoning, which appeared in numerous subsequent decisions:

> [T]he reasons of the rule [against restraints on legal interests] do not apply in the case of a transfer of property in trust . . . . [T]he trust property passes to the trustee with all its incidents and attributes unimpaired. He takes the whole legal title to the property, with the power of alienation; the *cestui que trust* takes the whole legal title to the accrued income at the moment it is paid over to him. Neither the principal nor the income is at any time inalienable.[120]

In other words, because of the trust form's separation of legal title from beneficial use, a restraint on the alienability of a beneficiary's interest in trust property was not a restraint on property. This doctrine was later extended to include restraints upon anticipation.[121] The trust restraint simply did not involve a problem of dead hand control.

To opponents of the new doctrines this reasoning was question begging. They attacked it on two fronts. First, they relied on a conception of property that included both legal and equitable interests, conceiving of the trust beneficiary's interest as a property right fully analogous to legal estates. Thus, for example, a dissenting opinion in an early case approving the spendthrift restraint argued: "Equitable as well as legal estates are property, and both species of estates are subject to the laws of property; and by those laws, both species of estates are alike sub-

119. 133 Mass. 170 (1882).
120. *Id.* at 172.
121. *See* Smith v. Towers, 69 Md. 77, 14 A. 497 (1888).

ject to the law of alienation . . . ."[122] This broadened conception of property was expressed as a rhetoric of rights. Title, management, and legal ownership were not controlling. What was important was whether the individual had received a legally recognized right to the use of assets. If so, then that right must remain alienable. Thus Gray stated, "To say whether a man has rights is often difficult, but there is and ought to be no difficulty in saying that his rights, whatever they are, are alienable . . . ."[123]

Those who opposed the deviationist trust doctrines expressed the policy of alienability in terms that clearly indicated its origins in the ideology of individual autonomy. Gray made this connection as explicitly as anyone:

> The true ground [why equitable estates cannot be made inalienable] is that on which the whole law of property, legal and equitable, is based;—that inalienable rights of property are opposed to the fundamental principles of the common law; that it is against public policy that a man "should have an estate to live on, but not an estate to pay his debts with," . . . and should have the benefits of wealth without the responsibilities. The common law has recognized certain classes of persons who may be kept in pupilage, viz. infants, lunatics, married women; but it has held that sane grown men must look out for themselves,—that it is not the function of the law to join in the futile effort to save the foolish and the vicious from the consequences of their own vice and folly. It is wholesome doctrine, fit to produce a manly race, based on sound morality and wise philosophy.[124]

In the next section I shall discuss the deeper conflict between the social visions of self-reliance and protectionism, but it is important to emphasize now that Gray's concern with preserving individual autonomy did not mean that proponents of the spendthrift trust and *Claflin* doctrines opposed the ethic of individualism. Indeed, one of the most striking aspects of the nineteenth century debates over these doctrines is the fact that the rhetorical modes of both sides appealed to individualism. Both sides saw themselves as defenders of individual freedom of alienation, the one protecting the grantor's power of alienation, the other preserving that power for the grantee. This principle of individual freedom of alienation itself was utterly indeterminate, so both sides could appeal to it. An unavoidable trade-off was involved, and

122. *Id.* at 105, 15 A. 92, 98 (Alvey, C.J., dissenting).
123. J. GRAY, *supra* note 28, § 261, at 246.
124. *Id.*, § 258, at 242–43.

the choice between grantor and grantee was ultimately based on a choice between competing social visions whose conflict was partially obscured by the common rhetoric of individualism.

The ambiguity in the precise content of the policy of alienability led, finally, to a breakdown within Classical legal thought regarding the conflict between public and private power, that is, the legitimacy of using legal power as a constraint upon private volition. Classical legal thought failed in its attempt to overcome the logical contradiction in the principle of freedom of disposition. The Classical synthesis had attempted to deal with it by recognizing that the will of the state could legitimately interfere with individual will when an objective and historically continuous public policy required. In the context of the law of restraints, this meant that courts could legitimately appeal to public policy to block individual intentions when necessary to preserve alienability. Both sides to the trust restraints debate shared this abstract analytical construct. They reached diametrically opposed conclusions about the specific issue because of the ambiguity within the public policy favoring alienability.

3. *Alienability and non-interference.*

In theory, a definite policy of alienability provided the objective source for separating private and public sectors into fixed and inviolable spheres.[125] Agreement upon the precise location of the boundary between these spheres of control was made impossible by the failure to agree upon the specific content of the alienability policy. The narrower, title-focused conception of that policy led to the view that trust settlors had not impermissibly crossed over the boundary into the sphere of public control when they imposed restraints on the alienation of equitable interests or postponed the time of payment of absolute interests to beneficiaries beyond the age of legal capacity to make a discharge. Conversely, the broader conception of alienability held by Gray led to the conclusion that these restraints, though the acts of private wills, could not be given legal effect because they related to matters that were within the exclusive jurisdiction of the state. A testator had no more power to withhold the aliena-

125. On the late nineteenth century enterprise of allocating authority between public and private spheres, see McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897,* 61 J. AM. HIST. 970 (1975).

bility of a transferred property interest than he had to create new types of estates.[126]

Ambiguity over the specific content of the alienability policy was an aspect of a deeper dissonance within legal thought during the Classical period. A fundamental element of late nineteenth century legal consciousness was at least nominal commitment to the principle of nonintervention, that is, the view that the purpose of property rules is to facilitate private arrangements. This principle was the legal expression of laissez-faire market ideology,[127] which is a common explanation for the appearance and adoption of the spendthrift and *Claflin* trust doctrines in the late nineteenth century. Griswold, for example, stated that *Nichols v. Eaton*[128] emanated from a "pioneer" mentality which he equated with belief in laissez faire.[129] The first wave of decisions approving of restraints on alienation and on anticipation emphasized carrying out the settlor's intentions and not interfering with his power of disposition. In a widely cited passage from *Claflin v. Claflin*, for example, the Massachusetts court stated:

> The decision in *Broadway National Bank v. Adams* . . . rests upon the doctrine that a testator has a right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees fit, and that his intentions ought to be carried out unless they contravene some positive rule of law, or are against public policy. The rule contended for by the plaintiff in that case was founded upon the same considerations as that contended for by the plaintiff in this, and the grounds on which this court declined to follow the English rule in that case

126. For a later version of this argument, see E. GRISWOLD, *supra* note 28, at 471, in which restraints against "involuntary alienability" (i.e., creditor access) were analogized to exemption statutes to prove that "[e]xemptions of this sort should be regulated by the state, not by the wishes of individual testators." *See also* Brahmey v. Rollins, 87 N.H. 290, 296, 179 A. 186, 191 (1935) (the right to seize property "is a public regulation of property beyond private control"); Swan v. Gunderson, 51 S.D. 588, 591, 215 N.W. 884, 885 (1927) ("It is elementary that no testator . . . can take such property out from under the operation of these [exemption] statutes and pro tanto repeal them."). This argument, it is worth noting, finesses the problem of nonintervention that was particularly troublesome to the Classics by simply asserting that the faculty of disposition, at least with respect to creditor access, is allocable according to public regulation.

127. On the principle of nonintervention and its analogue in economic theory, see Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1770–71 (1976).

128. 91 U.S. 716 (1875).

129. E. GRISWOLD, *supra* note 28, § 29, at 25–26. Lawrence Friedman has pointed out that the pioneer mentality did not necessarily include a belief in nonintervention. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 574 n.102 (1964).

are applicable to this . . . .[130]

The paradox that a general commitment to the principle of noninterference led judges to approve terms which were designed to interfere with the alienation of property interests is analogous to the treatment in the same period of the dilemma presented by contracts in restraint of trade.[131] During the late nineteenth century, English judges were generally indulgent toward such agreements even though their effect plainly undermined the ideal of freedom of contract. Similarly, American courts who approved of trust restraints were wary of accepting the paradoxical view that legal interference with private arrangements could be justified by its ultimate preservation of the nonintervention principle. Drawing a clear distinction between restraints that came about through acts of private will and those that emanated directly from the state (the old feudal restraints), these courts viewed enforcement of the trust restraints as dictated by their commitment to nonintervention and facilitation.[132]

To the extent that this explanation assumes that the laissez-faire principle was determinate and that it directed, for one committed to it, enforcement of the trust restraint terms, it is erroneous. It overlooks the fact that opposition to the new trust doctrines was sometimes expressly predicated on commitment to laissez faire. An obvious example is Gray's Preface to the Second Edition of his *Restraints* treatise, in which he characterizes the doctrines as conflicting with the laissez-faire principle:

> I have no doubt that the speedy acceptance of the doctrine of spendthrift trusts is largely due to the reaction against those doctrines of *laissez faire*, of sacredness of contract, and of individual liberty, which were prevalent during the greater part of the century. How strong that reaction is, how great has been its effect even upon those most unconscious of it, is a fact of which the civilized world has only of late years become clearly aware.[133]

To Gray, the restraints were a form of regulation that, if left unchecked, would inexorably slide into more overt forms of collective intervention. This helps to explain his seemingly

130. 149 Mass. 19, 23, 20 N.E. 454, 456 (1889).

131. For a discussion of this dilemma, see P. ATIYAH, *supra* note 14, at 697; Mensch, *Freedom of Contract as Ideology* (Book Review), 33 STAN. L. REV. 753, 758–60 (1981).

132. *E.g.*, Shelton v. King, 229 U.S. 90, 101 (1913) ("There is no higher duty which rests upon a court than to carry out the intentions of a testator when the provision is not repugnant to settled principles of public policy . . . .").

133. J. GRAY, *supra* note 28, at viii.

paradoxical characterization of spendthrift and indestructible trusts as "socialistic." The rule against all restraints on alienation, in his view, ultimately reinforced rather than conflicted with the principle of nonintervention.

The truth is that the principle of nonintervention, or laissez faire, was indeterminate. Both sides to the trust doctrine debate could and did adhere to it. That they reached dramatically opposed conclusions regarding its implication for the question of trust restraints merely confirmed its indeterminacy. At bottom, the doctrinal conflict rested on the substantive opposition between the social ethics of protectionism and of self-determination.

C. *Self-Determination and Protectionism*

To some extent the dissonance in Classical legal thought concerning the dead hand problem in trust law was conceptual. We have seen, for example, how the difference in the level of abstraction of the concept of property affected the meaning attached to the policy of alienability. To an even greater extent, the doctrinal conflict was a consequence of the contradictory nature of the principle of freedom of disposition. But the demise of the Classical synthesis was not solely due to conceptual factors. Ultimately it cannot be explained or understood apart from a conflict within social thought, concerning the proper ordering of society. Although the dichotomy has been labeled in various ways, most notably as "individualism" versus "altruism,"[134] I shall refer to the opposing visions as "self-determination" and "protectionism" in order to emphasize their connection with the rhetoric of the trust debate.[135]

The notion that social visions—views about what forms and modes of social arrangements are possible and desirable—have inspired, at a deep level, the development of legal doctrine, builds upon the Realist insight that the model of judicial neutrality, or state nonintervention, in private transactions is theoretically incoherent and practically false. Applied to property, this

134. Kennedy, *supra* note 127, at 1685.

135. Throughout this paper I have attempted to explore the thought structures of nineteenth century American property lawyers through analysis that is closely tied to their own rhetoric. The theoretical foundations of this methodology are elaborated in several outstanding papers, among which are J. POCOCK, *supra* note 10, at 3; Veysey, *Intellectual History and the New Social History,* in NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY 3, 19–24 (J. Higham & P. Conkin eds. 1979); Wood, *supra* note 100, at 27.

critique broke down the false distinction between "property" and "sovereignty." Private property was seen as a mechanism for allocating to some the "sovereign power [of] compelling service and obedience" from others.[136] Applied to the principle of freedom of disposition, this critique suggests that the consolidation model of property requires a choice between state recognition of the "autonomy" of the transferor and that of the recipient. The two sides to the trust doctrine debate can be viewed as making opposite choices. Their choices were not random, however; they were based on views about the appropriate ethic according to which social relationships based on property transfers should be structured. For the transfer of personal wealth, particularly in family property settlements, "is not only the means by which the reproduction of the social system is carried out . . . it is also the way in which interpersonal relationships are structured."[137]

1. *Protectionist exceptions to the principal of self-determination.*

The law of property is usually regarded as the province of individualism and autonomy. It is certainly true that during the nineteenth century the main doctrines of property law, strictly so called, favored the consolidation principle.[138] And it is equally clear that the consolidation tendency is consistent with the ideology of individual autonomy. In this sense, then, nineteenth century property law does reflect an ideological bias in favor of atomistic individualism and opposed to social interconnectedness. Even in relation to property transactions, however, Classical legal thought was ambivalent about this ideology and its concomitant ethic of self-determination. The recognition of restraints on anticipation of married women's separate equitable estates, for example, was a clear exception. So, too, were the statutes that exempted the family homestead and specific categories of personal assets from claims of creditors.[139]

136. Cohen, *Property and Sovereignty,* 13 CORNELL L.Q. 8, 12 (1927). *See also* Hale, *Coercion and Distribution in a Supposedly Non-Coercive State,* 38 POL. SCI. Q. 470 (1923) (asserting that governmental protection of an individual's property right is in effect coercion, and that distribution of income depends on the relative power of coercion possessed by different members of the community).

137. Goody, *Introduction* to FAMILY AND INHERITANCE: RURAL SOCIETY IN WESTERN EUROPE, 1200– 1800, at 1 (J. Goody, J. Thirsk & E.P. Thompson eds. 1976).

138. *See* Donahue, *supra* note 1, at 41.

139. This connection was recognized by J. GRAY, *supra* note 28, at vii, 4, 247, and by several courts during the Classical period. *See, e.g.,* Eaton v. Boston Safe Deposit and Trust Co., 240 U.S. 427, 429 (1916); Steib v. Whitehead, 111 Ill. 247, 251–52 (1884).

The spendthrift and *Claflin* trust doctrines are not as obviously associated with an ethic of protectionism. One feature that weakens such an association is the fact that the judicially developed rules did not confine the validity of the questionable restraints to trusts whose evident purpose was protection of the beneficiary. The categorical sweep of the rules effectuated the "dynastic" motive as well as the protective motive. The judicial rhetoric abstractedly emphasizing the transferor's intent also makes it difficult to connect trust doctrines with the ethic of protectionism.

Despite these factors that obscure the relationship between the trust doctrines and protectionism, I shall argue that those doctrines represented another exception to the ideology of individual autonomy. The passion of Gray's Preface to the Second Edition of his *Restraints* treatise indicates his awareness of the symbolic significance of those doctrines, which signaled the failure of the Classical attempt to maintain the hegemony of the ideology of autonomy over trust as well as property law.[140]

I shall begin to develop the connection between the trust doctrines and the ethic of protectionism indirectly, by first reiterating their effect upon the status of trust beneficiaries in contrast with the status of recipients of legal interests. Validating restraints on the alienability of the beneficiary's interest and on anticipation of possession of trust property placed the beneficiary in a subordinated, yet protected, position. Beneficiaries were protected against themselves and against external elements, such as creditors. By insulating beneficiaries, the trust restraints also protected the trust itself. Reinforced by the special, fiduciary nature of the trustee's duties, these restraints assured that beneficiaries and those whose interests derived from beneficiaries would lack the power to destroy the trust prior to the time determined by its creator. This position contrasts strongly with the contractarian thrust of the rejected English doctrines, which were consistent with the basic orientation of property laws. By consolidating power in the transferee, property doctrines maximized the autonomy of recipients at the expense of donors. In nontrust transfers and settlements of property, freedom of disposition is qualified by denying donors the power to protect and insulate donees. But trust law concedes to donors precisely the power to

140. *See* J. GRAY, *supra* note 28, at iii–xii.

insulate that property law denies. The outlook of trust law is, in this sense, noncontractarian.[141] This is particularly so under the *Claflin* rule, which ties the beneficiary to the trust and denies him the power to contract out of the trust by agreement with all other beneficiaries.

Opposition to the deviationist trust doctrines did not simply reflect a desire to maintain complete symmetry between property and trust law; it grew out of a sentiment that favored self-reliance. The new trust doctrines were regarded as deviationist and fundamentally incompatible with property law precisely because they reflected a social ethic of protectionism. This is particularly apparent in Gray's treatise, which exemplifies the Classical attack on the dead hand doctrines of the trust law.

Gray's book seems to modern eyes to be almost a caricature of late nineteenth century thought. While not all judges and legal writers who oppose the new trust doctrines have adopted all of Gray's views, his book does provide a useful collection of virtually all of the arguments that were developed in the Classical period against the trust doctrines. In particular, the Preface to the Second Edition, although somewhat shrill in tone, expresses an integrated, coherent social vision.

Gray's attack integrated the moral theory of self-reliance, the political theory of egalitarianism, and the economic theory of unrestricted markets. Indeed, there was no real separation of these elements in his arguments, although other critics confined the grounds of their opposition to one of these theories. Gray's argument based on the repayment of debts illustrates this blending of ethical, political, and economic considerations. In the Preface he states, "If there is one sentiment . . . which it would seem to be the part of all in authority, and particularly of all judges, to fortify, it is the duty of keeping one's promises and paying one's debts."[142] Gray did not base his argument against restraints as violating this "sentiment" solely on the view that restraints were a fraud on creditors of trust beneficiaries and therefore

141. Here I am not denying the essentially contractual nature of the method by which courts determine who becomes a trustee of a private express trust. Rather than focusing on who is a trustee and when fiduciary obligations arise, I am emphasizing that by preventing trust beneficiaries from "opting out" of the trust at a mutually agreed upon time, forcing conversion of trust interest into capitalized interest, the trust doctrines under discussion are contrary to a freedom of contract regime.

142. J. GRAY, *supra* note 28, at iii.

threatened the stability of credit,[143] although he clearly did so regard trust restraints and considered the arguments in *Nichols v. Eaton* [144] and *Broadway Bank v. Adams* [145] on this issue flatly wrong. Gray connected the argument against restraints to a theory of ownership as reciprocal—carrying with it responsibilities as well as benefits—and grounded this theory both in history and morality. Thus he states:

> The current of law has for centuries been in favor of removing old restraints on alienation; in favor of disallowing new ones; and especially in favor of compelling a debtor to apply to his debts all property which he could use for himself or give at his pleasure to others.[146]

Even if trust restraints did not constitute a fraud on creditors' rights, the restraints would nevertheless be unsupportable. For the "true ground" on which equitable interests must remain alienable and liable for debts—that "on which the whole law of property, legal and equitable, is based"—is that it is against public policy that a man "should have an estate to live on, but not an estate to pay his debts with, . . . and should have the benefits of wealth without the responsibilities."[147] There was no conflict between policy and morality here; the public policy was simply identified with "the moral sense . . . of imperative duty to use all the money that a man can control for the payment of his debts."[148] Attempts to insulate property interests were manifestations of "natural dishonesty."

Gray also tied his attack on restraints to a political theory of egalitarianism. He associated all restraints, privately imposed as well as feudal, with privilege and class bias, against which the law of property had struggled for centuries, particularly in the United States. Under the new doctrines, the family property trust had turned into an anachronistic throwback to feudal hierarchy:

> [I]t is hard to see the Americanism of spendthrift trusts. That grown men should be kept all their lives in pupilage, that men not paying their debts should live in luxury on inherited wealth, are doctrines as undemocratic as can well be conceived. They

143. For an example of this line of attack on the new doctrines, see the dissenting opinion in Smith v. Towers, 69 Md. 77, 100, 15 A. 92, 96 (1888) (Alvey, C.J., dissenting).

144. 91 U.S. 716 (1875).

145. 133 Mass. 170 (1882).

146. J. GRAY, *supra* note 28, § 4, at 2.

147. *Id.* § 179 at 171 (quoting Tillinghast v. Bradford, 5 R.I. 205, 212 (1858)).

148. J. GRAY, *supra* note 28, at vii.

> are suited to the times in which the Statute De Donis was enacted, and the law was administered in the interest of rich and powerful families. The general introduction of spendthrift trusts would be to form a privileged class, who could indulge in every speculation, could practice every fraud, and yet, provided they kept on the safe side of the criminal law, could roll in wealth. They would be an aristocracy, though certainly the most contemptible aristocracy with which a country was ever cursed.[149]

The context of this passage indicates the connection that Gray made between privilege and paternalism. In support of spendthrift restraints, Justice Miller in *Nichols v. Eaton* had analogized them to exemption statutes which were widely adopted in the nineteenth century.[150] Gray seems to have been ambivalent about these statutes.[151] He expressly disapproved of the statutes when they exempted too much homestead and personal property, but he did not categorically condemn them. Gray could justify certain exemption laws "on the theory that a man is more likely to be a useful member of society, and to pay his debts, if he is not deprived of his tools, or of a bare subsistence."[152] Trust restraints, however, were entirely different. Their purpose and effect was not to provide limited funds "to save poor men from being pushed to the wall" and rendered totally useless to society, but instead to "enable the children of rich men to live in debt and in luxury at the same time."[153] The restraints were fundamentally wrong because they undermined the beneficiary's self-reliance and thereby eliminated the incentive for him to become a useful, contributing member of society. Protected against his own mistakes and against the external world of work and debt, the beneficiary will fall victim to "natural dishonesty" and become a social parasite. "The desire that property shall be kept in a man's family, and that his descendants shall enjoy it, while their creditors shall not,"[154] is simply one aspect of the broader phenomenon of "the amiable altruistic sentiment, to-day so fashionable."[155] Left unchecked, such "sentimentalism" will "dash itself

149. *Id.* § 262, at 246–47.

150. 91 U.S. 716 (1875). *See generally* Haskins, *Homestead Exemptions,* 63 HARV. L. REV. 1289 (1950) (considering the nature of the homestead exemption from execution).

151. J. GRAY, *supra* note 28, § 263, at 247.

152. *Id.*

153. *Id.*

154. *Id.* § 143, at 140.

155. *Id.* at x.

in pieces against the inexorable facts of nature." [156] The famous passage in the Preface to the Second Edition makes the connection between privately imposed restraints and collective paternalism explicit:

> There is a strong and increasing feeling, and a feeling which has already led to many practical results, that a main object of law is not to secure liberty of contract, but to restrain it, in the interest, or supposed interest, of the weaker, or supposed weaker, against the stronger, or supposed stronger, portion of the community. Hence, for instance, laws enacted or contemplated for eight hours' labor, for weekly payments of wages by corporations, for "compulsory arbitration," &c., that is, laws intended to take away from certain classes of the community, for their supposed good, their liberty of action and their power of contract; in other words, attempts to bring society back to an organization founded on status and not upon contract. To a frame of mind and a state of public sentiment like this, spendthrift trusts are most congenial. If we are all to be cared for, and have our wants supplied, without regard to our mental and moral failings, in the socialistic Utopia, there is little reason why in the mean time, while waiting for the day, a father should not do for his son what the State is then to do for us all.[157]

Fundamentally, then, Gray's opposition to the trust doctrines was rooted in a social vision of self-determination. The objective of the Classical synthesis was to maintain that vision as the foundation of a comprehensive rational theory of the law of property transfers.

From the perspective of modern legal and political culture, Gray's characterization of the trust doctrines as paternalistic seems paradoxical. Today the doctrines are widely criticized as "individualistic" and inspired by laissez faire ideology. What explains these contradictory grounds of attack? In part, as I suggested earlier, the rhetorical and analytical constructs used by the courts which approved of the restraints during the late nineteenth and early twentieth centuries are responsible for the modern critique of the doctrines as individualistic. Not only did the opinions emphasize effectuating the will of the transferor, but they also constructed the legal issue in terms of a choice between the interests of only two parties: the donor and the creditors of the donee. Armed with this construct, they skirted the necessity of making what might have appeared to be an arbitrary choice

156. *Id.*
157. *Id.* at ix.

between the two sides, by finding that creditors' interests were not threatened by enforcing the restraints. The inevitable conclusion was to carry out the intent of the donor. Significantly, the courts minimized or entirely ignored any interest of the donee independent of the donor and the creditors. Coupled with the rhetoric of nonintervention, this construct creates the impression that the legal reasoning of those cases grew out of the nineteenth century laissez faire mentality.

More importantly, the discrepancy between the Classical and modern critiques can be explained in terms of substantive differences between their background legal cultures. Gray's critique, written at the beginning of the period of Progressive regulation, derived from the fading ideal of laissez faire market theory. Today, the welfare state provides the base for attack on trust restraints. Protectionism means redistributive legislative programs that identify discrete categories of people who are thought to be vulnerable.[158] Against this background the trust restraints appear reactionary: They frustrate redistributive goals by facilitating the formation and maintenance of large personal fortunes, and they mock the ideal of protectionism by insulating the children of wealthy families while the rest of society is left to face the vagaries of the market. Given the gross imbalance of wealth within society, it seems absurd to justify restraints imposed in family property settlements on grounds of protectionism. The class bias behind the facade of protectionism is as unmistakable now as it was in the seventeenth century when Chancery protected expectant heirs against improvident sales of their inheritance interests.[159]

Nevertheless, within the context of Classical legal thought,

158. Legal writing on these doctrines during the early 1930s reflects a perceptible shift toward a perspective that is sympathetic to the protective aspect. Against the backdrop of the Depression, this sentiment is hardly surprising. A particularly clear example that explicitly acknowledges the influence of the Depression experience is Costigan, *Those Protective Trusts Which Are Miscalled "Spendthrift Trusts" Reexamined,* 22 CALIF. L. REV. 471 (1934). Other contributions to this distinctive group of writings include Scott, *Protective Trusts,* in HARVARD LEGAL ESSAYS 419 (1934) (questioning how far one generation should be allowed to relieve the next generation from the responsibility for property ownership); Cleary, *Indestructible Testamentary Trusts,* 43 YALE L.J. 393 (1934) (describing the limits of the testamentary trust as a mechanism for dead-hand control of property); Manning, *The Development of Restraints on Alienation Since Gray,* 48 HARV. L. REV. 373 (1935) (examining the spendthrift doctrine); Walsh, *Indestructible Trusts and Perpetuities in New York,* 43 YALE L.J. 1211 (1934) (discussing the perpetuities problem in New York).

159. *See* Dawson, *Economic Duress—An Essay in Perspective,* 45 MICH. L. REV. 253, 267–68 (1947) (asserting that the motive behind this protection was clearly to preserve

the trust doctrines did represent a social vision antithetical to self-determination. Of the many expressions of this perspective, two of the more colorful excerpts from opinions approving restraints on alienation of equitable life interests are worth quoting. In *Steib v. Whitehead,*[160] the first case to apply the *Broadway Bank* doctrine in Illinois, the court stated:

> [A] trust, however carefully guarded otherwise, would in many cases fall far short of the object of its creation, if the father, in such case, has no power to provide against the schemes of designing persons, as well as the improvidence of the child itself. If the beneficiary may anticipate the income, or absolutely sell or otherwise dispose of the equitable interest, it is evident the whole object of the settlor is liable to be defeated. If, on the other hand, the author of the trust may say, as was done in this case, the net accumulations of the fund shall be paid only into the hands of the beneficiary, then it is clear the object of the trust can never be wholly defeated. Whatever the reverses of fortune may be, the child is provided for, and is effectually placed beyond the reach of unprincipled schemers and sharpers.
>
> The tendency of present legislation is to soften and ameliorate, as far as practicable, the hardships and privations that follow in the wake of poverty and financial disaster . . . . The practical results of this tendency, we think, upon the whole, have been beneficial, and we are not inclined to render a decision in this case which may be regarded as a retrograde movement.[161]

An even more vivid example is drawn from a West Virginia decision of the same period:[162]

> Why should not a father having a dissolute, improvident or unfortunate son, be able to so bestow his own property as to protect that son from penury and want? Why should not a loving wife be allowed to so deposit her separate estate in the hands of a trustee so as to keep her aged, unfortunate, dissolute or improvident husband from trudging his weary way over the hill to the poor house? Why should not any one be allowed to use his own property so as to keep the guant [sic] wolf of grinding poverty from the home door of those near and dear to his heart?[163]

The protectionist perspective recognizes that members of society have an obligation to care for one another, an obligation

for a dominant class, the landed aristocracy, the economic resources upon which its power and prestige depended).

160. 111 Ill. 247 (1884).

161. *Id.* at 251–52.

162. Guernsey v. Lazear, 51 W. Va. 328, 41 S.E. 405 (1902).

163. *Id.* at 340, 41 S.E. at 410.

that does not derive from consent, express or implied, but from the fact of belonging to a social group. Gray correctly discerned a connection between the trust restraints and the overtly protective legislation that appeared during this period, although he also correctly rejected any suggestion that the judges who developed the trust doctrines were "secret socialists."[164] The protectionist perspective approves the attempt to use property as the foundation for connecting members of society rather than separating them, as the Classical synthesis envisioned. It conceives of the settlement of property as a social arrangement in which individuals are treated not as disconnected, atomistic agents, but as members of an association established for the well-being of one and all. The protectionist perspective rejects the moral imperatives of self-reliance and self-determination. It approves of sacrificing individual freedom of action for the good of the group as such sacrificing is ultimately for the good of the individual as well. It posits that individuals cannot and do not always correctly calculate their own best interests; thus "coercive" constraints upon the power to contract out of a group merely protect individuals against actions made on the mistaken assumption that they will be personally beneficial. As Gray correctly saw, protecting the true interests of the beneficiary involves restraining the power of parties who deal with the beneficiary from exploiting that person's disadvantage. Proponents of the trust doctrines tried to paper over this aspect, but it was so obvious that it is difficult to take their denial seriously. Approval of the restraints represented an unacknowledged but practically evident choice in favor of beneficiaries rather than creditors and others with whom beneficiaries deal. For, as even some of Gray's contemporaries noted, the new trust doctrines carried out the protectionist idea that a person may enjoy the benefits of ownership and yet hold them beyond the reach of creditors.[165]

I do not suggest that proponents of trust doctrines translated this ideal into an integrated social vision and consistently pursued it. The purpose of introducing protectionism and self-determination as social visions is not to characterize the thought of any of the participants in doctrinal debate as thoroughly committed to one or the other. Nor is it to categorize whole bodies of

164. J. GRAY, *supra* note 28, at ix.

165. *See generally* Brown, *Spendthrift Trusts,* 54 CENT. L.J. 382 (1902) (analyzing the development of the spendthrift trust doctrine).

conflicting legal doctrines immediately according to opposed social visions. The relationship between protectionism and self-determination as ideals and between those ideals and legal doctrine is far more complex and elusive. Both protectionism and self-determination played roles in the legal thought of the late nineteenth century. Classical legal thought posited a conflict between them, but did not regard it as possible or even desirable to completely eliminate one or the other.

2. *Harmonization through separate spheres.*

Accepting both ethics as coexisting aspects of culture created a need to isolate them from each other in order to avoid a sense of irreducible conflict and incoherence within the legal order. Classical legal thought attempted to fulfill this task by dividing human activity into discrete and insular spheres in which one or the other ethic manifestly predominated. Since the different spheres of human activity shared no common area, the contrasting visions of protectionism and self-determination had no occasion to compete with each other. This meant that Classical legal thought could recognize protectionism without subverting self-determination.

One, and for our purposes the most significant, form in which this abstract scheme was made concrete was the dichotomy between the world of commerce and the world of the family. Frances Olsen has shown how nineteenth century thought posited this dichotomy and through it was able to project value polarities that reinforced rather than undermined each other.[166] Thus the world of commerce could be admired for its emphasis on self-reliance even as it was recognized as selfish because the communal and protective values embedded in the world of the family " 'undercut opposition to exploitative pecuniary standards in the work world, by upholding a "separate sphere" of comfort and compensation, instilling a morality that would encourage self-control, and fostering the idea that preservation of home and family sentiment was an ultimate goal.' "[167]

The specific legal function served by dividing social activity into different spheres, each with its accompanying ethical orientation, was to avoid the sense of irreducible conflict in the ethical

166. *See* Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

167. *Id.* at 1500, *quoting* N. COTT, THE BONDS OF WOMANHOOD 69 (1977).

dimension of legal doctrine. The discrete categories of private law were seen as corresponding to the different areas of human activity and spheres of ethical influence. The law of contracts, for example, clearly belonged with the world of commerce; hence contract doctrine was, at the core, the province of self-determination. Exceptional situations, where the doctrines did not comport with the predominant ethic, were recognized but confined to a corner by subcategorization to avoid contradiction. This was particularly apparent with respect to the law of property, where the consolidation-of-control principle implemented the self-determinist vision. While the equitable doctrine recognizing separate and transferable married women's estates could be seen as consistent with the consolidation principle,[168] the doctrine that restraints on anticipation of such equitable estates were valid was patently protective. Proponents of the Classical synthesis argued that there was no conflict between this equitable doctrine and property law's prohibition of restraints on alienation and anticipation. Gray expressed the most common argument:

> It [the equitable doctrine] is perfectly consistent with the general doctrine which underlies this whole subject. That doctrine is, that it is against public policy to permit restraints to be put upon transfers which the law allows. But the common law does not allow married women to transfer their property. The separate estate which allows a transfer is the creature of equity, and it cannot be deemed against public policy for equity to permit its creation to be moulded by a clause against anticipation; for the tendency of such clause is only to put the married woman where the common law has always put her.[169]

The difficulty with this argument was that it proved too much. It could be used, and occasionally was, to support the validity of restraints on all equitable interests, including those of trust beneficiaries.[170]

Fitting the law of trusts into the scheme was a problem. For in its dominant use as a device for implementing family property settlements, the trust shared characteristics of both the world of

168. For a representative study in one state of the development of married women's separate equitable estates in American law, see N. BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK 72–83 (1982).

169. J. GRAY, *supra* note 28, § 269, at 258, citing the famous English case, Tullett v. Armstrong, 41 Eng. Rep. 147, 152 (1839).

170. *See* Lampert v. Haydel, 96 Mo. 439, 9 S.W. 780 (1888); Bartelme, *Spendthrift Trusts,* 50 ALB. L.J. 6 (1894); Brown, *supra* note 165.

commerce, as a transfer of property, and the world of the family, as an arrangement that provided support for the private community. This ambiguous character of the trust made it difficult to reconcile the visions of protectionism and self-determination by assigning them priority over discrete areas of social activity.

Gray seems to have realized that the equitable doctrine of restraints on anticipation of married women's separate estates was exceptional.[171] Not content to rely on the disingenuous argument that the doctrine merely placed married women's separate estates on the same footing in equity as they had in law, Gray acknowledged its essentially protective character but tried to isolate it from the rest of the law of restraints. His treatment of the topic in the first edition of *Restraints on the Alienation of Property* conveys both a sense of grudging acceptance of this minimal degree of protectionism and anxiety that the disease might spread uncontrollably and infect legal and equitable doctrines unrelated to the special case of married women who were, after all, grouped together with infants and lunatics.[172] Legal protection of married women in settlement trusts was acceptable because the subject of women's property was distinct from the rest of property law. It belonged to the world of domestic life, while the core of property law was part of the world of commerce. Gray's concern with integrating direct restraints doctrine, legal and equitable, so that it was symmetrical with the law of indirect restraints—particularly the Rule Against Perpetuities, which he successfully tightened—grew out of this view of property as an aspect of that realm of social activity where the ethic of self-reliance was dominant. The second edition of *Restraints* reflected dismay that the ideal of symmetry had been abandoned and that the law of trusts had become more completely infected by the spirit of protectionism.[173]

Proponents of the protective trust doctrines viewed the broadening of protectionism beyond married women's trusts as a salutary elaboration of a successful episode in "social experimen-

171. J. GRAY, *supra* note 28, § 269, at 258.

172. J. GRAY, *supra* note 28, § 258, at 170.

173. [I]f paternalism is to be introduced into our law, its introduction in this particular class of cases seems to be without the advantages that may exist elsewhere, and to retain only its irritating and demoralizing features. The farther these novel doctrines are carried out, the greater seems the wisdom of the old law.

J. GRAY, *supra* note 28, § 1240, at 120.

tation."[174] If restraints upon anticipation were an acceptable form of protectionism, what was to prevent the law from treating all trust beneficiaries in the same way? "[T]he wedge was in, and it could be driven home."[175] The social context that made restraints upon the married woman's power to anticipate her separate equitable estate acceptable was generalized as the background for restraints on all trust interests.

The association of private trusts with the world of the family meant, first, that the traditional common law attitude of solicitude toward intrafamilial gifts was relevant in evaluating trust restraints. Judicial opinions frequently asserted that failure to enforce the settlor's restraint would constitute "fraud on his generosity."[176] Thus the rhetoric emphasizing that the will of the settlor was paramount did not grow out of a blind commitment to the abstract principle of *cujus est dare*, but instead reflected a vision of the gift as an instrument of family-preserving generosity.

The association of private trusts with the world of the family provided an even stronger basis for giving effect to the trust restraints. The family property trust was treated as a surrogate for the family itself. Enforcing the restraints against alienation and anticipation reproduced, in the context of the trust arrangement, the nineteenth century image of the structure of power within the family.[177] Autonomy and freedom of action were as undesirable in the beneficiary as they were in the child. Just as the family was identified as a hierarchical arrangement within which broad discretionary power was conferred on the husband in order to maintain its well-being, so the private trust was made into a structure of power within which the power of beneficiaries was subordinate to that of the settlor. In approving of the trust restraints, then, the courts maintained against the social image of the family that they associated with the private trust the principle of freedom of property owners to deal with their interests as they wished. Ironically, Gray and other lawyers opposed to all restraints had removed one impediment to infusing trust doctrine with the

174. F. MAITLAND, *supra* note 17, at 175.

175. *Id.* at 176.

176. *See, e.g.*, Nichols v. Eaton, 91 U.S. 716, 727 (1875); Holdship v. Patterson, 7 Watts 547, 551 (Pa. 1838).

177. *See* Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 618–25 (1983) (discussing "Principle and Counterprinciple: Freedom to Contract and Community").

protectionist vision by discrediting the repugnancy thesis, upon which the English doctrines had been based. The resulting narrowed, title-based conception of the policy of alienability meant that the public policy which supported the common-law prohibition of restraints in the case of legal property interests did not apply to prohibit equitable restraints on trust interests.

IV. The Search for Rational Compromise

Although the essential contradiction in the principle of freedom of disposition had crystallized in the form of a doctrinal conflict by the first part of the twentieth century, American property lawyers continued to avoid acknowledging it. To be sure, there were some differences between nineteenth and twentieth century legal discourse about the problem of restraints on alienation. But for the most part, the doctrinal structure developed and preserved by the Classics still survived, and the old ways of categorizing continued to be practiced. In this section I shall briefly describe how twentieth century legal thought has sought to mediate the dilemma posed by the regime of consolidated property whose disposition is subject to private volition. Unlike the nineteenth century, the twentieth century has produced no single works whose arguments are characteristic of legal thought for the entire period. Necessarily, therefore, the rationalizing arguments that I shall describe in this part are synthetically constructed from several different sources.

A. *The Balancing Model*

The most striking feature of post-Classical legal discourse about the problem of restraints is how little, on balance, it changed from the rhetoric of the late nineteenth century. It is not surprising that the doctrinal conflict between law and equity over the validity of direct restraints did not generate any significant rethinking since, as indicated above,[178] the equity judges who developed or adopted the deviant trust doctrines for the most part did not acknowledge any conflict. More surprising perhaps is the lack of any serious critique of the problem by the legal realists. The few exceptions to this pattern of neglect, such as the attacks by Morris Cohen[179] and Myres McDougal,[180] were

178. *See* text accompanying notes 115–116 *supra.*

179. Cohen, *Property and Sovereignty,* 13 Cornell L.Q. 8 (1927).

180. M. McDougal & D. Haber, Property, Wealth, Land: Allocation, Planning

conspicuous precisely because they were exceptional. Certainly their critiques produced no sweeping changes in the mode of analysis used by most academics and judges. The most obvious effect of legal realism in this area was to make the Classical reliance on an abstract, unproblematic principle of freedom of disposition seem naive to lawyers after the 1930s. The post-realist generation purported to recognize that the concept of ownership "does not embrace an unqualified power of disposition in any way desired. There is no syllogistic basis for the spendthrift trust."[181]

But even as it admitted the "tension" within the freedom of disposition principle, post-realist legal thought denied the full implications of the contradictions. The traditional structure of the dead-hand doctrines remained more or less intact, and the controversies concerned reforms that merely lingered within the margins of the structure.

Having abandoned the absolutist principle of freedom of disposition, the post-realist generations rationalized the extant doctrinal structure on the basis of the familiar balancing model. Property lawyers justified doctrines relating to restraints as "uneasy compromise[s]"[182] of conflicting claims, achieved through rational analysis of all relevant policies. Whereas the Classical approach attempted to construct a single, comprehensive, integrating principle, the modern strategy deals with dead-hand problems in piecemeal fashion through ad hoc balancing of conflicting policies.

In the modern framework, the freedom of disposition principle still retains a role in legal reasoning, but it is no longer conceived in its Classical, absolute sense. Instead, modern legal analysis recognizes that the principle can serve two contradicting viewpoints: donor and recipient, or, in generational terms, present and future generations.[183] Expressing the problems in these terms made it clear that allocating the power of disposition is ultimately a matter of collective decision. Each owner has, prima facie, the power to dispose, but the abstract idea of legal intervention to regulate that power was more problematic in the pe-

AND DEVELOPMENT (1948); McDougal, *Future Interests Restated: Tradition Versus Clarification and Reform*, 55 HARV. L. REV. 1077 (1942).

181. E. GRISWOLD, *supra* note 28, at 467.

182. *Id.*

183. Powell, *Freedom of Alienation—For Whom? The Clash of Theories*, 2 REAL PROP., PROB. & TR. J. 127 (1967).

riod of the late nineteenth century than it is in the modern period where legal regulation of the power of disposition is guided, and at the same time rationalized, by the concept of "social welfare." In the post-realist period, most legal writing on the topic of restraints has focused on the task of specifying the content of "social welfare" as a mediating concept. In the remainder of this section, I shall survey the dominant conceptions of social welfare that are regarded as justifying collective regulation of privately imposed restraints on alienation. Before proceeding to study these notions of social welfare, it is important to emphasize their shared historical character.

B. *The Evolving Concept of Social Welfare*

All accounts of social welfare share a theme of historical continuity and coherence and postulate the existence of a single, continuous policy against restraints on alienation.[184] The function of the unitary policy is to bring "together a substantial body of . . . social restrictions which relate to the creation of property interests by donative transfers,"[185] that is, to rationalize as consistent and coherent all of the various doctrines that concern various aspects of the contradiction posed in the regime of freedom of disposition.

Mid-twentieth century analyses of the various rules against restraints illustrate how legal thought avoids the full implications of historicizing legal policies through the thesis of adaptive evolution. It explains the emergence of new rationales as necessary in order to adapt to changed external conditions. For example, throughout the nineteenth century the dominant rationale supporting the Rule Against Perpetuities and related doctrines was that they forwarded the circulation of property.[186] Post-realist lawyers argued that the change in the dominant forms of wealth to intangible ownership of interests in corporate shares and to

184. The following passage from a well known treatise illustrates the character of modern legal thought:

> It is believed . . . that the body of rules on restraints on alienation, diverse though they are, represent the extension of but a single policy of the law; that, though this policy is largely inarticulate, it nevertheless has pervaded the law for centuries and still furnishes the important element of unity in this branch of the law.

L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1115 (2d ed. 1956).

185. RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS, introductory note at 3 (1983).

186. J. GRAY, THE RULE AGAINST PERPETUITIES § 2.1 (4th ed. 1942).

beneficial interests under trusts which gave the trustee power to alter the form of trust property had weakened the force of the circulation-of-property argument. By 1955, Lewis Simes could announce that enhancement of productivity was no longer a sufficient justification for the Rule Against Perpetuities.[187]

With the decline of the circulation-of-property rationale in the twentieth century, property lawyers justified legal regulation of individually-imposed restraints by objections to the very fact of dead-hand control rather than by the need to keep units of capital subject to market forces. Though objections to dead-hand control have been notoriously vague in typical policy discussions, they can be organized around two basic arguments—one emphasizing social considerations, and the other based on economic concerns. While there is a good deal of overlap between them, the economic argument is more recent and has been replacing the social argument due, in part, to the latter's perceived weaknesses. The Introductory Note to Part I of the *Restatement (Second) of Property: Donative Transfers* conveniently summarizes both the social and economic arguments.

1. *The social argument.*

Referring specifically to the Rule Against Perpetuities, but with the intent to explain other rules as well, the *Restatement* note sets out a rationale that focuses on social considerations:

> [T]he rule against perpetuities provides an adjustment or balance between the desire of the current owner of property to prolong indefinitely into the future his control over the devolution and use thereof and the desire of the person who will in the future become the owner of the affected land or other thing to be free from the dead hand. Thus viewed, the regulation of the interference with the alienation of property is socially desirable because it embodies one of the compromises prerequisite to the maintenance of a going society controlled primarily by its living members.[188]

This policy statement is either tautological or so vague as to be meaningless. It fails to explain how the conflict between the desires of present and future owners in itself justifies compromising the present owner's freedom to dispose of her property as she wishes, rather than compromising the future owner's freedom nor does it elaborate on the specific terms of such a com-

187. L. SIMES, PUBLIC POLICY AND THE DEAD HAND 52–54 (1955).
188. RESTATEMENT (SECOND) OF PROPERTY, *supra* note 185, at 8.

promise. The idea seems to be that as each generation of property owners comes into possession members of that generation should be free to dispose of property as they wish, unconstrained by the dictates of the past generation of owners. Of course, the power of current owners is qualified; the present generation of users is not free to impose restraints on future generations. Each successive generation has rights of free disposition enforceable against each former generation; thus, neither generation really has the right of free disposition.

The appeal of this view lies not in its logic but in the emotive content of the dead hand as a symbol. The appeal to a struggle against the dead hand has historically been an effective rhetorical strategy for justifying legal restrictions on gratuitous transfers of property, especially in the United States, because reference to the dead hand evokes images of aristocracy and wealth inequality based on feudal-like hierarchy. By associating the rules regulating restraints with a struggle against such forms of social hierarchy based on accumulations of inherited wealth, this strategy coordinates the collective restrictions with the liberal political ideal under the principle of freedom of disposition. The logical contradiction in that principle is not overcome here; rather, one transcends it by grounding social restrictions in the effort to overcome hierarchical constraints that ultimately undermine the liberal order.

This symbolic imagery masks the effect of social restrictions on dead hand control. By constraining the past owner's power to withhold the power of disposition from the present owner's bundle, the restrictions reinforce the consolidated model of ownership. But that model itself is the foundation for hierarchical social relationships generating the very conditions of domination and subordination that liberal theory traditionally has sought to prevent. The social argument, then, simply builds upon, rather than overcomes, the fundamental contradiction in the liberal legal conception of property: In order to realize the ideal of nonhierarchical social arrangements, it is necessary to recognize the legitimacy of acts of the self through the exercise of private volitions, but at the same time hierarchical social arrangements are created through the exercise of unconstrained private volition.

2. *The economic argument.*

More recently, legal restrictions on an owner's power to im-

pose restraints have been justified on the basis of a more explicitly consequentialist argument that is related to legal economics. The *Restatement* Introductory Note brings together several threads of this economic argument in the following passage:

> [T]he rule against perpetuities [and related rules] serves to keep property responsive to the needs of its current owners. . . . [The commitment of] a given quantum of wealth . . . to the satisfaction of specific and stated ends . . . lessens the availability of these assets for the meeting of current newly arising exigencies. Law which is animated by the idea that the world and its wealth exist for the living cannot tolerate too long a commitment of this sort. Thus the rule against perpetuities . . . assists in keeping property reasonably free to answer the exigencies . . . of the possessor and of his family . . . . [The rule's function] has broadened to include the prevention of limitations which "freeze" or "tie up" property for too long a time, even though no specific thing has been made inalienable, even for a moment.[189]

Expressing this argument in a more concrete form, the *Restatement* points out that even where access to the market is possible, the value of an asset may be diminished by dividing it into successive temporal interests. The amount realized by selling all of the separate interests is likely to be less than the market value of the same assets left undivided.

Ideally, of course, this problem can be overcome by an agreement among all owners of successive interests to pool their interests into undivided ownership. Since the sale of the undivided interest is presumed in this analysis to bring a higher price than isolated sales of each separate interest, every owner would be better off by agreeing to merge their interests and divide the proceeds of sale among themselves on some proportionate basis. What prevents such agreements, and thereby underlies the inefficiency of unrestricted temporal division of ownership, are the transaction costs of arranging concerted action by all of the owners.[190]

There are several aspects of this problem of transaction costs.

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189. *Id.* at 9–10.

190. Frank Michelman rigorously analyzes this problem in terms of reconciling what he calls internalization and nonintervention as competing principles in a private property regime. He analyzes the efficiency-oriented basis for reconciliation as the principle of "market facilitation," that is, facilitating cheaper coordination through small-number transactions. His paper proceeds to an illuminating critique of the nonverifiable premises which must be added to the postulate of persons as rational actors, that is, self-interest maximizers, in order to make a prima facie case of private property as the more

First, the sheer number of people to be consulted makes concerted action costly. Second, all of the persons owning an interest may not be known or readily identifiable. Indeed, since the common law protects future interests of unborn persons, it may not even be possible to obtain the consent of all of them, and solutions to this problem, such as appointing guardians ad litem,[191] are costly. Finally, since the success of this approach depends upon the sale of an entire, undivided interest, every interest holder must agree to the plan. Here we encounter the familiar problems of strategic behavior. One or more of the persons whose consent is required may adopt holdout tactics in order to increase their gains from the proceeds. Such demands for overcompensation are widely identified as raising transaction costs in other contexts,[192] and there is no reason to think they would be any less present here. Because of these various transaction costs, agreements among all owners of successive interests that would maximize the value of each owner's interest are unlikely to be reached.

Viewed as a response to the problem of high transaction costs, legal restrictions such as the Rule Against Perpetuities[193] and the rules against direct restraints on alienations are maladaptive. Limitations on the number of successive interests into which ownership can be divided or on the duration of such interests would be more appropriate. The Rule Against Perpetuities does not limit the duration of future interests at all, and it only indirectly restricts the number of interests that can be created by voiding certain classes of remote future interests. So much latitude is permitted regarding the number and remoteness of valid interests that transactions among all owners of a given asset are

efficient regime. Michelman, *Ethics, Economics, and the Law of Property,* in NOMOS XXIV: ETHICS, ECONOMICS, AND THE LAW 3, 17–21 (J. Pennock & J. Chapman eds. 1982).

191. *See* Hatch v. Riggs Nat'l Bank, 361 F.2d 559 (D.C. Cir. 1966). The impediment to reaching an optimal solution through agreements that is presented by legal recognition of property interests in an unborn or unascertained person is well-recognized in connection with attempts by identified and living trust beneficiaries to compel premature termination of the trust. For a helpful recent discussion of this problem, see Bird, *Trust Termination: Unborn, Living, and Dead Hands—Too Many Fingers in the Trust Pie,* 36 HASTINGS L.J. 563 (1985).

192. The point is a familiar one, for example, in analyses of the comparative efficiency advantages of injunctive and damages forms of relief for nuisances. *See, e.g.,* J. DUKEMINIER & J. KRIER, PROPERTY 934–35 (1981); A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 18–20 (1983).

193. *But see* Epstein, *The Static Conception of the Common Law,* 9 J. LEGAL STUD. 253, 267–69 (1980).

likely to be costly. Modern writers tend to respond to this critique by arguing that the point is not to reduce transactions costs to zero but to reduce them to "reasonable bounds" or to eliminate "excessive" transaction costs. Couching the policy in such vague terms makes it virtually impossible for the Rule to fail to meet the standard. Policy analysis seems to be a game that was rigged from the beginning. At the end of the critique the doctrine emerges fundamentally intact and the status quo is preserved.

3. *The unforeseeability argument.*

Another version of the rationale for putting property at the disposal of current owners adopts a rather different tack. Building on the truism that the human capacity to foresee future events is limited, both the *Restatement* and writers, though firmly committed to respecting private volition, have nevertheless concluded that owners' past expressions of intention should not necessarily be dispositive of what present owners are empowered to do. Rational former owners would want their terms disregarded when new, unanticipated exigencies threaten to frustrate their underlying objectives. Richard Posner articulates exactly this argument as rationalizing legal restrictions on dead hand control:

> [T]he dilemma whether to enforce the testator's intent or to modify the terms of the will in accordance with changed conditions since his death is often a false one. A policy of rigid adherence to the letter of the donative instrument is likely to frustrate both the donor's purposes and the efficient use of resources . . . . [S]ince no one can foresee the future, a rational donor knows that his intentions might eventually be thwarted by unpredictable circumstances and may therefore be presumed to accept implicitly a rule permitting modification of the terms of the bequest in the event that an unforeseen change frustrates his original intention.[194]

Under this view, a restraint is invalid if its underlying purpose is likely to be frustrated by future, unpredictable changes of circumstance. The legal rules simply give effect to the intention that a more prescient donor would have had.

This argument is unpersuasive for two reasons. First, it is premised upon a notoriously indeterminate standard—unforeseeability. So long as a change of circumstances is found to have been unforeseeable at the time the restraint was imposed, the re-

194. R. POSNER, ECONOMIC ANALYSIS OF LAW § 18.2, at 390 (2d ed. 1977).

straint need not be enforced. Of course, the question arises only when some new sequence of facts occasions a request to override the restraint, but in each such case the standard of unforeseeability easily justifies voiding every restraint that in retrospect seems unwise or unfair. Hence, the donor's private volition is extremely vulnerable to displacement by a contrary collective judgment.

In addition to the problem of indeterminacy, this argument is maladaptive with respect to the most important legal restrictions on dead hand control, particularly the Rule Against Perpetuities. The common law Rule Against Perpetuities was directed at the problem of the vesting of future interests and bears little relationship to the problem of inefficient use of resources due to unforeseen changes in circumstances. The problem of changed conditions relates to the duration of fragmented interests. As a response to this problem the Rule is both underinclusive and overinclusive. It is underinclusive because it exempts all "vested" future interests, including possibilities of reverter and rights of entry. As a result, these interests are familiar devices for exerting dead hand control indefinitely unless curbed by statutory limitations. The rule is overinclusive because it invalidates future interests that present no practical threat to remote vesting.[195] Furthermore, the changed conditions doctrine is not consistently applied in different contexts. For example, while it is applied in the law of servitudes, it is not generally applied to easements.[196] The application and rejection of the doctrine in these different contexts seems to have little or no relationship to the magnitude of transaction costs. Where the changed conditions problem has been recognized, the remedial rules, both in the form of common law doctrines and statutes, sometimes have

195. The most obvious examples are the technical perpetuity violations that result from the assumptions resulting from the Classical requirement of initial certainty, such as the possibility that a person younger than eight years old or older than sixty may continue to bear children. These problems are discussed in Waggoner, *Perpetuity Reform,* 81 MICH. L. REV. 1718 (1983).

196. *See, e.g.,* Cilberti v. Angilletta, 61 Misc. 2d 13, 304 N.Y.S.2d 673 (1969) (discussing changed conditions doctrine in the law of restrictive covenants); First Nat'l Trust & Sav. Bank v. Raphael, 201 Va. 718, 113 S.E.2d 683 (1960); Waldrep v. Town of Brevard, 233 N.C. 26, 62 S.E.2d 512 (1950) (changed conditions will not justify nonenforcement of express easement). The effect of the changed conditions doctrine in the law of servitudes as overriding rather than implementing private intentions is pointed out in Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions,* 70 IOWA L. REV. 615, 652-54 (1985).

adopted more direct means to resolve the problem (for example, by limiting the duration of restrictions or interests that are likely to become outmoded).[197] The extraordinarily complex semantic structure that is associated with the dead hand doctrines bears little similarity to these other legal responses to the changed conditions problem.

Contemporary legal thought lacks any conception of "social welfare" that coherently rationalizes the extant body of doctrines regulating individual power to impose restraints. From a strictly instrumental perspective, the existing policy analyses are incoherent because they do not support the doctrines they were designed to explain. Indeed, this instrumental critique was the core of Myres McDougal's frontal, but ultimately unsuccessful, attack on the extant doctrinal structure. A more fundamental reason, however, for the incoherence of post-realist policy analysis is that by justifying collective constraints on individual power to dispose expressly on the basis of the social welfare value, modern legal discourse itself contradicts the individualistic foundations of the freedom of disposition principle. It accedes to social control over the right of disposition in order to further social interests without admitting that it has thereby abandoned the individualized power of disposition.

One can understand this overtly contradictory condition of admission and denial in terms of our own ambivalent feelings about social versus individual control over disposition of property. These conflicting impulses in turn are a part of the fundamental modern problem of the individual in society.[198] We sense that each individual's personality is realizable only as a member of the community, but we hesitate to acknowledge the ubiquity of the community in our lives for fear that it implies a loss of self-control. This immediately felt dialectic between the liberating and threatening aspects of community and self is played out in modern legal discourse concerning the problem of the individual power of disposition. The various rationales that comprise the twentieth century search for rational compromise are stories to

197. *E.g.*, Mass. Gen. Laws Ann. ch. 184, § 23 (1977) (time limit on restrictive covenants); Ill. Rev. Stat. ch. 30, § 37(e) (1978) (time limit on possibilities of reverter and rights of entry).

198. Duncan Kennedy's discussion of what he calls the "fundamental contradiction" generalizes this observation. My point here is simply to indicate how the evidence ambivalence in property doctrine can be understood in terms of his analysis. *See* Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979).

reassure ourselves that neither the one nor the many have too much power—they stand in a certain, if undefined, equilibrium.

V. CONCLUSION

The doctrinal development of the law of alienation of property is conventionally depicted in progressive, instrumental terms.[199] The policy of promoting the alienability of assets has been the central rhetorical device for rationalizing the legal system's collective interference with the private power of disposition. The familiar view is that the legal system has historically interfered with freedom of disposition in order to preserve alienability and that this policy objectively derives from the market form of economic organization.[200] Doctrines that apparently deviate from the alienability policy, such as the dead hand doctrines of trust law, are integrated into this progressive picture on the

199. Although mainstream legal writing, which I mean to distinguish from professional historical scholarship, describes doctrinal development in virtually all legal subjects as progressive, my impression is that this is especially true of writing about property law. This may be surprising to some readers who tend to identify property law with the law of estates in land and, with respect to the latter, quickly recall Holmes' criticism of adhering to a rule simply because "it was laid down in the time of Henry IV." Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 469 (1897). However, it is just this popular identification of the origins of the law of property with feudalism that provides the foundation for the view that property doctrines have evolved so far, continuously becoming more rational. Consider, for example, how commonly the theme by which the development of the law of estates is characterized is stated as "Up From Feudalism." A more sophisticated version of this progressive and validating theme, expressed in connection with the development of the individuated form of property rights generally rather than with respect to any particular legal doctrines, is found in Demsetz, *Toward a Theory of Property Rights,* 57 AM. ECON. REV. 347 (1967). The efficiency-of-private-property thesis is criticized in Michelman, *Ethics, Economics, and the Law of Property,* in NOMOS XXIV: ETHICS, ECONOMICS AND THE LAW 3 (J. Pennock & J. Chapman eds. 1982), and Kennedy & Michelman, *Are Property and Contract Efficient?,* 8 HOFSTRA L. REV. 711 (1980).

200. The linkage between the market economy and the policy of alienability in property law is a clear example of "necessitarian" theories of legal development. For discussions of these theories, see Unger, *The Critical Legal Studies Movement,* 96 HARV. L. REV. 561, 567–70 (1983) (existence of a distinct legal structure inherent in particular type of social organization as the core of objectivism in legal thought); Gordon, *New Developments in Legal Theory,* in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281, 284–88 (D. Kairys ed. 1982) (view that legal systems go through different stages that are necessary consequences of the prevailing mode of economic organization is common to all versions of instrumental theory of relationship of law to society). Robert Gordon has produced a body of historiographical work that describes the dominant version of mainstream legal scholarship as "evolutionary functionalism" and powerfully criticizes the ideological message of that vision. *See* Gordon, *Critical Legal Histories,* 36 STAN. L. REV. 57 (1984); Gordon, *Historicism in Legal Scholarship,* 90 YALE L.J. 1017, 1028–36 (1981); and Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise: 1870–1920,* in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70 (G. Geison ed. 1983).

basis of an assertion that changes in external conditions eliminate, or at least weaken, the concern for alienability. This line of historical explanation exemplifies how the model of instrumental rationality has been used to fit doctrinal deviations into the progressive image of the law of property as having evolved from feudalism, which was characterized by social hierarchy based on inalienable property, to the liberal consolidated property regime, which satisfies the needs of a market economy while protecting individual autonomy.

The aim of this article has been to offer a critique of this progressive and instrumental account of the doctrinal development of the law of alienation and the dead hand problem. I have emphasized the doctrinal conflict between property and trust responses to the problem of restraints on alienation as exemplifying liberal legalism's inability to resolve the dilemmas inherent in the consolidated model of property. Viewed against the background of these dilemmas, such doctrinal conflicts can no longer be mediated through reference to changes in external conditions. These conflicts cast doubt upon the progressive image of the development of the law of alienation and, by illuminating the contingency of legal "solutions" to the dead hand question, they cast doubt upon the coherence of the consolidation model of property itself.

Precipitated in part by the critique of realist writers like Morris Cohen, whose famous paper pointed out that so-called private property is nothing but the power granted by the state to individuals to exclude others, modern legal thought gives limited recognition to these dilemmas,[201] which it commonly refers to as "tensions."[202] Modern analysis, however, continues to adhere to the Classical consolidation model as the dominant conceptual structure of property rights. The primary enterprise of modern legal reasoning about property rights is still understood in terms of developing rational bases upon which to allocate entitlements among competing spheres of individual autonomy. And despite even more recent talk about the "death of property,"[203] the concept of ownership has retained its intellectual hegemony as the

201. Cohen, *Property and Sovereignty,* 13 CORNELL L.Q. 8 (1927).

202. *See, e.g.,* E. GRISWOLD, *supra* note 28, at 467; Langbein, *Substantial Compliance with the Wills Act,* 88 HARV. L. REV. 489, 491–92 (1975).

203. Grey, *The Disintegration of Property,* in NOMOS XXII: PROPERTY 69 (J. Pennock & J. Chapman eds. 1980) (concept and institution of property have disintegrated so that property is no longer an important category in legal or political theory).

basis for structuring social relationships with respect to units of social capital. My sense is that modern legal consciousness has not accepted the full implications of these historical lessons—less out of a positive commitment to the classical vision of atomized social relationships than out of despair that the only alternative is a regime of dependence and insecurity, in which "the management of resources [is] understood to be ultimately at the disposal of authority."[204]

The statement of this dilemma justifies a refusal to search for less arbitrary ways to assign the discrete powers that are aggregated in the liberal legal concept of ownership. However, we are not without relatively concrete proposals for avoiding the pessimistic and cynical standoff between domination by collective control and coercion through individualized power.[205] Roberto Unger, for example, has proposed that property rights be reconstituted into so-called market rights, which are "conditional and provisional claims to divisible portions of social capital."[206] Short of a total transformation of society, but perhaps an incremental move toward it, we might enrich legal doctrine by treating no single actor's intent as capable of trumping the intentions of all other actors with respect to the disposition of a given asset. In other words, any individual's intent would be relevant but not dispositive. We might then explicitly take into account other factors that are presently excluded from consideration under the consolidated property regime. Need is one obvious candidate. What other factors merit consideration, how much weight to grant to the intentions of various "holders" of property, and under what circumstances, are questions that could then be raised directly. At that point we would at least have acknowledged the lessons of our historical experience with the consolidation model of property rights by infusing our doctrinal discourse with the recognition of the inevitability of interdependency.

204. Milsom, *The Nature of Blackstone's Achievement*, 1 OXFORD J. LEGAL STUD. 4 (1981).

205. *See* Michelman, *supra* note 190, at 30–31.

206. Unger, *supra* note 199, at 600.