Volume 60 | Issue 5 Article 5

1-1-2016

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## Recommended Citation

Luke Meier & Rory Ryan, *Aggregate Alienability*, 60 Vill. L. Rev. 1013 (2016).
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# AGGREGATE ALIENABILITY

LUKE MEIER* AND RORY RYAN**

THIS Article proposes a new concept—"aggregate alienability"—as a lens by which to understand the complicated law regarding the validity of privately-imposed restraints on the alienability of real property. Modern scholars have tended to explain this law—which sometimes invalidates restraints and sometimes upholds and enforces restraints—as simply a "naked preference." In those instances in which the restraint is upheld and enforced, the law is said to prefer the alienation rights of the grantor (the party imposing the restraint). When the restraint is stricken, the law is said to prefer the alienation rights of the grantee (the party on whom the restraint is imposed). This Article rejects the notion that the nuanced law regarding the validity of restraints on alienability is best explained as simply a naked preference in favor of some parties over others. Instead, this Article argues that the rules regarding the validity of restraints on alienation are actually based on a rough prediction as to how to maximize property alienability. In some instances, maximum alienability is best achieved by invalidating the attempted alienability restraint. In other instances, however (and somewhat counter-intuitively), maximum alienability is best achieved by upholding and enforcing an alienability restraint. In either instance, the legal rules about the validity of a particular restraint are not a preference for either the grantor or the grantee, but an attempt to maximize efficiency by facilitating the alienation of property.

## I. INTRODUCTION

The legal concept of private property is fundamental to the workings of a capitalist market.[1] In a capitalist system, decisions regarding resource allocation are primarily made at the individual level.[2] Government creates

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1. *See* AYN RAND WITH NATHANIEL BRANDEN, ALAN GREENSPAN & ROBERT HESSEN, CAPITALISM: THE UNKNOWN IDEAL 19 (New Am. Library 2d ed. 1967) ("Capitalism is a social system based on the recognition of individual rights, including property rights, in which all property is privately owned."); Paul H. Rubin & Tilman Klumpp, *Property Rights and Capitalism*, *in* THE OXFORD HANDBOOK OF CAPITALISM 204, 204 (Dennis C. Mueller ed., 2012) ("Property rights are a necessary but not sufficient condition for capitalism.").

2. *See* GARY WOLFRAM, A CAPITALIST MANIFESTO: UNDERSTANDING THE MARKET ECONOMY AND DEFENDING LIBERTY 1 (2012) ("The genius of capitalism is that it is . . . a fluid system with millions of individual exchanges, resulting in the most efficient allocation of resources."); *see also* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 15 (1962) ("[A] major source of objection to a free economy is precisely that it . . . . gives people what they want instead of what a particular group thinks they ought to want."); LUDWIG VON MISES, SOCIALISM: AN ECONOMIC AND SOCIOLOGICAL

and enforces entitlements to "property," which allows individual users to decide what to do with "their" property.[3] By enforcing private agreements to trade these rights, resources flow to the party in the best position to do something beneficial with that resource. This result is in society's interest as a whole.[4] Indeed, one of the "sticks" in the "bundle of rights" associated with property is the right to alienate that property according to the user's perception of what is in his best interest.[5]

In order for this flow to the "best" user to occur, the resource must remain free of legal impediments to transfer. As such, the common law has generally strived to keep property freely alienable, particularly real property.[6] In some instances, such as with the rule against perpetuities, common law rules have developed to deal with private decisions that might indirectly inhibit the transfer of real property.[7]

The most obvious example of the common law's effort to keep property alienable, though, is the set of rules invalidating attempts by individu-

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ANALYSIS 537 (J. Kahane trans., Ludwig von Mises Inst. new ed. 2009) (1951) ("The issue is always the same: the government *or* the market. There is no third solution.").

3. *See* Richard A. Epstein, *All Quiet on the Eastern Front*, 58 U. CHI. L. REV. 555, 560 (1991) ("The first mission of the legal system is to determine an initial set of property rights from which subsequent bargains can go forward at reasonably low cost. . . . The third mission of the law is to facilitate the voluntary exchanges of property rights—the law of contracts.").

4. *See* II ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 419, 421 (Edwin Cannan ed., 1904) (1776) ("Every individual is continually exerting himself to find out the most advantageous employment for whatever capital he can command. It is his own advantage, indeed, and not that of the society, which he has in view. But the study of his own advantage naturally, or rather necessarily, leads him to prefer that employment which is most advantageous to the society. . . . [H]e intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was not part of his intention."); JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH 322 (2d ed. 2012) ("Utilitarian theory holds that transferability is necessary to ensure the productive use of land."); *see also* F. A. v. Hayek, *Scientism and the Study of Society* (pt. 3), 11 ECONOMICA 27, 29–30 (1944) ("Many of the greatest things man has achieved are not the result of consciously directed thought, and still less the product of a deliberately co-ordinated effort of many individuals, but of a process in which the individual plays a part which he can never fully understand.").

5. *See, e.g.*, JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 80 (4th ed. 1998) (describing "right to transfer" as stick in bundle of property rights).

6. *See* A. W. B. SIMPSON, AN INTRODUCTION TO THE HISTORY OF THE LAND LAW 224 (Oxford Univ. Press, 2d ed. 1986) (stating that common law has attempted to preserve property alienability); Andrea J. Boyack, *Community Covenant Alienation Restraints and the Hazard of Unbounded Servitudes*, 42 REAL EST. L.J. 450, 452 (2014) ("Traditionally, the law has jealously guarded the right to transfer real property, striking down deed alienation restraints . . . .").

7. *See* JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE 184 (1998) ("The Rule Against Perpetuities is a means to prevent, or limit, 'indirect' restraints on alienation.").

als[8] to directly restrain the alienability of real property.[9] When *A* transfers Blackacre to *B* while attempting to withhold (or inhibit) *B*'s ability to subsequently transfer Blackacre, *A* has directly restrained the alienability of Blackacre. This restraint on *B*'s ability to transfer Blackacre seems to directly contradict the general goal of keeping property free from restrictions on transfer. As such, one might expect the common law to flatly prohibit *A* from imposing *any* restraints on *B*'s ability to transfer Blackacre.

As any first-year law student knows, however, the common law does not indiscriminately invalidate *all* privately imposed alienability restraints. Instead, the law regarding the validity of privately imposed alienability restraints is incredibly nuanced.[10] For instance, restraints imposed upon fee simple estates are usually invalid,[11] while restraints on a tenant's ability to transfer a leasehold are almost always upheld and enforced.[12] In some instances, the "black letter law" consists of nothing more than a "rule of thumb": restraints imposed in a donative transfer are more likely to be judicially invalidated than restraints imposed as part of a non-donative, arm's-length transaction between grantor and grantee.[13]

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8. At the outset, it is important to note that this Article deals only with privately imposed alienability restraints. Some of the most influential recent commentary regarding property alienation has focused on legal rules that operate to prohibit the alienation of certain rights. *See generally, e.g.*, Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 984–85 (1985) (justifying legally imposed as opposed to privately imposed restraints on alienability in contexts such as sale of voting rights); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 962–63 (1985). The legality (and desirability) of privately imposed restraints is a completely different topic than legally imposed restraints on alienability; legally imposed restraints impede the market, while privately imposed restraints are a by-product of the market.

9. *See* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 532 (2007) ("The law has long favored transferability of property. Nowhere is this more clearly seen than in the common-law rule against restraints on alienation.").

10. *See* Michael D. Kirby, Comment, *Restraints on Alienation: Placing a 13th Century Doctrine in a 21st Century Perspective*, 40 BAYLOR L. REV. 413, 413 (1988) ("The modern terminology which has developed for the classification of these 'restraints on alienation' would appear to pigeonhole each attempted restraint, eliminating all doubt as to what is a restraint and which restraints are valid. However, as with many common law concepts, different judges have given diverse opinions relating to classification and validity, resulting in inconsistent application of already vague rules of law." (footnote omitted)).

11. *See* Glen O. Robinson, *Explaining Contingent Rights: The Puzzle of "Obsolete" Covenants*, 91 COLUM. L. REV. 546, 567 n.76 (1991) ("Absolute, explicit restraints are everywhere held invalid when imposed on fee simple estates . . . .").

12. *See* Alex M. Johnson, Jr., *Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward a Theory of Relational Leases*, 74 VA. L. REV. 751, 755 (1988) ("Historically, the common law courts, preferring form over function (as in much of property law), have not viewed the lease as a freehold estate, and have allowed absolute restrictions on the alienability of a lease.").

13. *See infra* note 29. Indeed, the most recent trend is to express the *entire* body of law regarding the validity of alienation restraints in the form of an all-encompassing balancing test. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 (2000) ("A servitude that imposes a direct restraint on alienation of the burdened

If *A* is *sometimes* allowed to transfer Blackacre to *B* while simultaneously prohibiting B's ability to transfer Blackacre, an obvious question arises: why? Given the importance of property transfers to a market economy, and given the common law's general effort to keep property alienable, why would *A*—at least in *some* instances—be allowed to directly prohibit *B* from transferring Blackacre?

Efforts by legal scholars to answer this question have shifted over time. Under what can be labeled as the "initial view," scholars tended to conceive of the nuanced common law regarding the validity of alienability restraints as a balance between the policy goal of free alienability and other, competing policy interests.[14] Because free alienability had to be balanced against other policy interests, restraints on alienability would sometimes be invalidated and sometimes be upheld.[15] In certain circumstances (such as with a restraint on a fee simple estate), the goal of free alienability was paramount and, consequently, the alienability restraint would be invalidated. In other instances, however (such as with a restraint on a leasehold estate), the policy objective of free alienability was trumped by countervailing policy goals,[16] and the alienability restraint would there-

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estate is invalid if the restraint is unreasonable. Reasonableness is determined by weighing the utility of the restraint against the injurious consequences of enforcing the restraint."). The general consensus, however, is that the new balancing test proposed in the Third Restatement is simply a different way of articulating this complex body of law. *See* Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1410 (2013) (explaining that Third Restatement balancing test does not "displace" previous body of law).

14. *See, e.g.*, Seagate Condo. Ass'n, Inc. v. Duffy, 330 So. 2d 484, 485 (Fla. Dist. Ct. App. 1976) ("The ancient rule against restraints on alienation is founded entirely upon considerations of public policy, specifically, the idea that the free alienability of property fosters economic and commercial development. Competing policy considerations, however, have, almost from the inception of the rule, caused exceptions to be carved out of it." (citations omitted)); Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1223 (1985) ("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.").

15. This perspective can still be seen in some modern scholarship. *See, e.g.*, James J. Kelly, Jr., *Homes Affordable for Good: Covenants and Ground Leases as Long-Term Resale-Restriction Devices*, 29 ST. LOUIS U. PUB. L. REV. 9, 25 (2009) ("[T]hese common law standards [ ] strike a balance between alienability and competing goals . . . ."); Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U. L. REV. 1525, 1549 (2007) ("Although the policy of freedom of contract would argue for the enforcement of all consensual land allocation agreements, another major policy—free alienability of real property—may require the abrogation of some land contracts.").

16. The articulation of these competing policy objectives is often somewhat vague. *See, e.g.*, Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 555 (2001) ("[T]he economic policy

fore be upheld and enforced by the courts. Thus, the initial answer by early scholars to the question posed in the previous paragraph ("Why does the law sometimes permit *A* to restrain *B*'s ability to alienate Blackacre?") was that the goal of free alienability sometimes had to be subordinated to different policy objectives.

This view has been rejected by most modern scholars. Modern scholars reject the starting assumption that the goal of free alienability is necessarily advanced by invalidating an alienability restraint. For modern scholars, the goal of advancing alienability is more complicated than what was contemplated under the initial view. [17] According to the modern view, the problem with the initial view was that it considered the alienability question only at the point in which *B* desired to transfer to a third party (*C*) in violation of a previously imposed restraint. From this limited vantage point, of course, alienability is enhanced if the restraint is stricken and *B* is allowed to transfer to *C*. For modern scholars, though, this approach to the issue is incomplete, and a more comprehensive perspective is needed. This perspective must consider the alienability question not just at the point in time at which *B* desires a transfer to *C*, but also at the point in which *A* initially transferred to *B*.[18] The modern perspective is best understood according to the timeline depicted below:

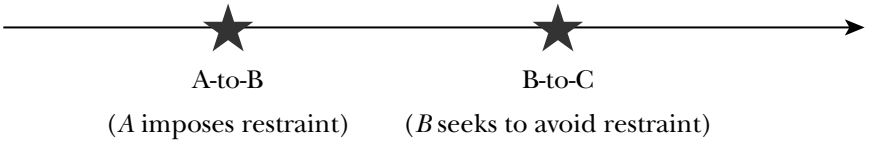


FIGURE A

While invalidating *A*'s restraint allows the B-to-C transaction to occur, modern scholars have recognized that this decision inhibits *A*'s ability to freely alienate his property as he sees fit (including by withholding the right to alienate from *B*). Modern scholars describe this as a paradox: a decision to enforce the restraint obviously interferes with the *grantee's* ability to alienate the property. Invalidating the restraint, however, interferes

disfavoring restraints on alienation often collides with policies or practices that support the social and economic interests of groups or political goals of civic participation.").

17. *See* Alexander, *supra* note 14, at 1189 ("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.").

18. Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1199 (1999) ("Thus, it is rarely clear whether alienability refers to a current or future owner's freedom to dispose of undivided ownership.").

with the *grantor's* alienation rights, whose ability to dispose of property as he sees fit is impeded when a restraint clause is stricken.[19]

From this perspective, some modern scholars have reasoned that the policy goal of keeping property alienable cannot explain the nuanced common law as to when privately imposed restraints are valid or invalid because a decision to either uphold or invalidate the restraints promotes *one* party's alienation rights.[20] If the restraint is stricken, *B* is allowed to transfer to *C*. If the restraint is upheld and enforced, *A*'s alienation rights are protected. Under the modern perspective, then, the underlying policy in this area of the law is not the promotion of alienability, but resolving *whose* alienation rights should be preferred: the grantor's (by upholding the restraint) or the grantee's (by invalidating the restraint). Resolving this problem is simply a "naked preference" in favor of either the grantor or the grantee.[21] Thus, the modern answer to the previously-posed question is as follows: Party *A* is sometimes allowed to restrain Party *B*'s right to alienate because sometimes the law prefers Party *A* over Party *B*.

This Article proposes a different perspective. In some sense, the perspective advanced herein is consonant with the modern critique of the initial view: we agree that a comprehensive account of alienability law must consider the issue from the perspective of *both* the A-to-B transaction and the B-to-C transaction. This Article, however, rejects the notion that this perspective compels the conclusion that the black-letter law is simply a "naked preference" in favor of either grantors or grantees. Instead, we argue that the nuanced law of alienation restraints can be largely explained by the objective concept of "aggregate alienability." Aggregate alienability posits that restraints are either valid or invalid based on a rough sense by judges as to how to keep property as alienable as possible,[22] considered from the perspective of *both* the grantor (who desires to

19. *See, e.g.*, MERRELL & SMITH, *supra* note 9, at 532 ("This rule [against restraints on alienation], of course, limits the freedom of the original owner to transfer: The original owner is barred from engaging in a transfer that limits further transfers."); *see also* EDWARD H. RABIN ET AL., FUNDAMENTALS OF MODERN PROPERTY LAW 257 (6th ed. 2011) (describing tension between proposition that property owners should be able to sell their property as they see fit with notion that property owners should be bound by commitment not to refrain from selling property).

20. *See* Richard R. Powell, *Freedom of Alienation—For Whom? The Clash of Theories*, 2 REAL PROP. PROB. & TR. J. 127, 127 (1967) (discussing how law regarding restraints on alienability pits alienation rights of grantor verses alienation rights of grantee).

21. *See* Alexander, *supra* note 14, at 1193 ("[W]ithin the individualistic regime of consolidated property there is no objective basis for choosing between the autonomy of the donor and that of the donee . . . any resolution of that problem is a 'naked preference.'").

22. Some commentators have distinguished the term *alienability* from *marketability*, with *alienability* referring to the *legal right* of a party to sell a property interest (or a fraction thereof) and *marketability* referring to the *desirability* of the property interest on the open market. *See, e.g.*, PAUL GOLDSTEIN, REAL PROPERTY 474 (1984) (making this distinction). Under this lexicon, our "aggregate alienability" concept might be more appropriately labeled as *aggregate marketability*. Although this Arti-

alienate his property while simultaneously restraining the alienation rights of the grantee) *and* the grantee (who desires to alienate in violation of the previously imposed restraint). The development of the black-letter law in this area is not simply a series of naked preferences by judges in favor of grantors or grantees, but rather a calculated effort to achieve a desired result (maximum alienability) in a complex environment. In our view, then (and to answer the question posed above), the law sometimes permits *A* to restrain *B*'s right to alienate because—counterintuitively—this might actually *enhance* the aggregate alienability of the property involved.

Properly understanding the true basis of the nuanced law of restraints on alienability, we believe, has profound consequences outside of the ivory tower. Every day, judges and lawyers struggle to apply the common law of alienability restraints to new or unresolved issues. Without a clear understanding of the theoretical basis of this body of law, lawyers and judges in cases of first impression are often forced to resolve these questions in an analytical vacuum, usually by strained analogies to accepted black-letter rules.[23] By understanding the true basis of the nuances within this body of law, judges and lawyers can ask the "right" questions in resolving a particular dispute. The objective of this Article is to provide an accurate theoretical understanding of the nuanced law of the validity of privately imposed alienability restraints, so that future disputes in this area can be resolved faithful to the policy goals which originally shaped this complex body of law.

## II. AGGREGATE ALIENABILITY EXPLAINED

This Section explains the concept of aggregate alienability. This idea assumes that a decision by courts to either enforce or invalidate a privately imposed alienability restraint can have a net effect on the overall alienability of property. This Section will rely heavily on the timeline depiction introduced in the previous section:

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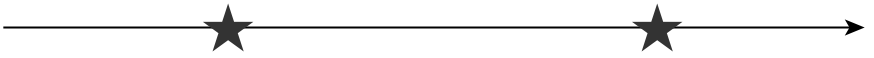
cle considers the *legal rules* that sometimes restrain a grantor's *alienation rights*, we posit that these rules are actually based on a rough sense of how those alienation rules ultimately affect the *actual marketability* of the property in question. We ultimately, however, decided to use the more generic term *aggregate alienability* in this Article. This decision was based, in part, on the fact that some commentators have employed the terms *alienability* and *marketability* to make entirely different analytical distinctions than the one described above. *See* Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1427–28 (2009) (using *alienability* to refer to legal *prohibitions* on property transfers and *marketability* to refer to legal conditions that *impede* property transfers); Heller, *supra* note 18, at 1200 ("[A]lienability refers to an individual's freedom to fragment and transfer ownership today, while marketability refers to the rules that keep property available for future productive use by limiting individual choice."). Also, we just like the phrase *aggregate alienability* better than *aggregate marketability*.

23. We have experienced this phenomenon, first hand, in a case dealing with the validity of restraints on alienation in an oil and gas lease. Our involvement in that case was the impetus for this Article.



A-to-B (*A* imposes restraint)

B-to-C (*B* seeks to avoid restraint)

FIGURE B

In the A-to-B transaction, *A* grants property to *B* but restricts *B*'s ability to subsequently transfer that property. In the B-to-C transaction, *B* seeks to transfer the property to *C* in violation of the previously imposed restraint. As previously explained, a comprehensive approach to alienability law requires that both of these transactions be considered.

At the point that *B* seeks to transfer to *C* in violation of the previously imposed restraint (and assuming that the validity of this transfer is presented to a court), [24] a court can either invalidate or uphold the legality of *A*'s restraint on *B*'s power of alienation. This decision will obviously affect the validity of the B-to-C transaction. If the restraint is upheld, the B-to-C transaction is legally precluded. In this sense, then, the alienability of the property has been restricted: a transaction that the market desires (B-to-C) has been prevented.

On the other hand, a decision by a court to invalidate the alienability restraint will have the effect of permitting the B-to-C transaction to occur. From the perspective of keeping property alienable, this seems like a good thing; the transaction that the market desires is not precluded by the courts. Here, however, it is important to consider what impact this decision might have on the A-to-B transaction.[25] Of course, if we consider *A* to be a specific party, a decision by a court at the point that *B* seeks to transfer to *C* can have no effect on the A-to-B transaction; this transaction has already occurred. But if the A-to-B transaction is considered as a *type* of transaction rather than a specific transaction, then it is clear that a court's decision to invalidate or uphold the alienability restraint can influence whether A-to-B transactions even occur. If parties like *A* know that their desired restraint on *B*'s alienability will not be enforced, they might forgo this transaction altogether.

A decision to either invalidate or uphold the alienability restraint, then, has inverse effects on the respective A-to-B and B-to-C transactions. Upholding the restraint precludes the B-to-C transaction, as well as all transactions *like* B-to-C. Invalidating the restraint allows the B-to-C transaction (and all similar transactions) to proceed, but will likely inhibit parties like *A* from engaging in future A-to-B transactions. The figures below depict this inverse relationship:

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24. *Cf. infra* note 50.

25. Professor Fennell has labeled this type of analysis as an ex ante or "upstream" objection. *See* Fennell, *supra* note 22, at 1411–12 (distinguishing "upstream" objections to market transfer from "downstream" objections to market transfer (internal quotation marks omitted)).

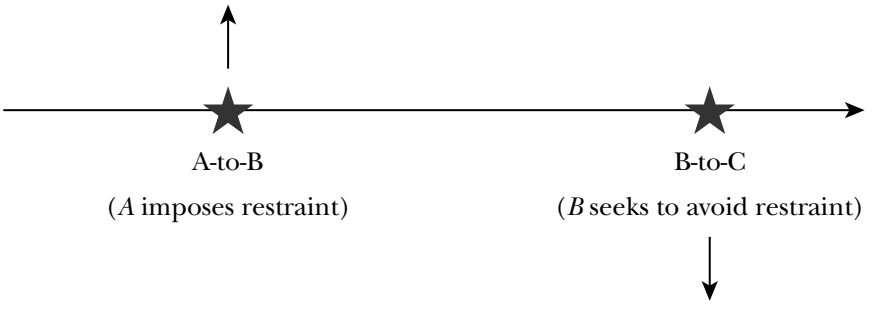


FIGURE C (RESTRAINT UPHELD AND ENFORCED)

In Figure C, the restraint has been enforced. The B-to-C transaction is precluded, and this effect on market alienability is represented by the "down" arrow. The A-to-B transaction, however, can proceed, with parties like *A* knowing that their desired alienability restraint will be enforced by the courts. This result is depicted by the "up" arrow.

In Figure D below, the restraint is invalidated, producing the opposite effect on the respective transactions. Because the restraint is unenforceable, the B-to-C transaction can proceed, as represented by the "up" arrow. The A-to-B type of transaction will be inhibited, however, because parties like *A* might choose to refrain from entering into the transaction if they know that their desired restraint will not be enforced. This result is depicted by the "down" arrow.

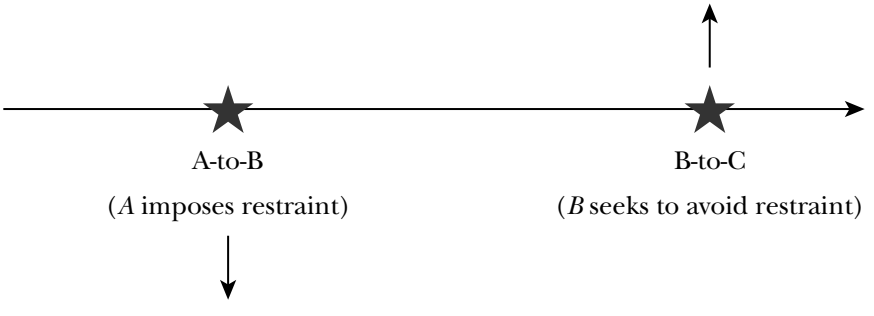


FIGURE D (RESTRAINT INVALIDATED)

As this relationship is depicted in Figures B and C, it is tempting to conclude that a decision to either uphold or invalidate the alienability restraint will be a "wash" in terms of the overall effect on alienability. Either way, one type of transaction (A-to-B or B-to-C) will be prohibited (or chilled) and one type of transaction will be permitted.

The concept of aggregate alienability advanced herein, however, states that a decision to either uphold or invalidate an alienability restraint will not necessarily produce an *exact* inverse effect on transactions A-to-B and B-to-C. Thus, the "benefits" of invalidating the restraint (permitting B-to-C transactions) might outweigh the "costs" (chilling the A-to-B trans-

action). Or, the benefits of upholding the restraint (no chilling on A-to-B transactions) might outweigh the costs (precluding B-to-C transactions). This idea is best explained by returning to the depictions used above.

Recall that a decision to invalidate an alienability restraint will permit B-to-C transactions but will chill A-to-B transactions. Under aggregate alienability, however, the chilling of A-to-B transactions might be less pronounced then the positive impact on B-to-C transactions. This is depicted in Figure E below. In Figure E, invalidation of the alienability restraint has some chilling effect on A-to-B transactions. However, this effect is muted because some (perhaps many) parties in the position of *A* will proceed with the A-to-B transaction even though they know they cannot achieve their desired result of restricting *B*'s power of alienation. The diminished "down" arrow under the A-to-B transaction represents this result.

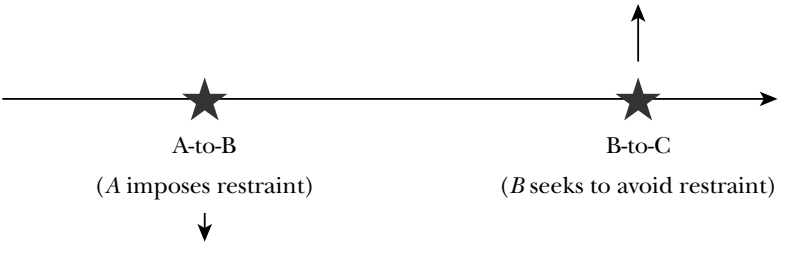


FIGURE E (RESTRAINT INVALIDATED, MUTED EFFECT ON A-TO-B TRANSACTION)

In Figure E, invalidating the alienability restraint achieves aggregate alienability: B-to-C transactions can occur, and although some A-to-B transactions are chilled, the net effect of this chilling is less than the B-to-C transactions that are allowed.

Aggregate alienability can also work in the opposite (less counterintuitive) direction. Recall that a decision to uphold and enforce an alienability restraint precludes B-to-C transactions but has no chilling effect on (and thus facilitates) A-to-B transactions. Under aggregate alienability, however, certain factors might mute the prohibitive effect on B-to-C transactions that occurs from enforcing the alienability restraint. This result is depicted below in Figure F by the diminished down arrow under the B-to-C transaction.

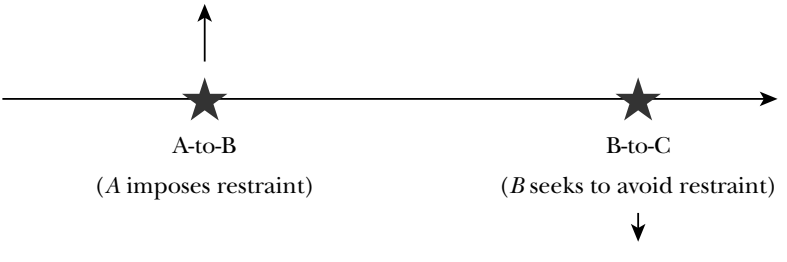


FIGURE F (RESTRAINT UPHELD AND ENFORCED, MUTED EFFECT ON B-TO-C)

In this situation, net alienability is actually achieved by upholding the restraint. This facilitates A-to-B transactions, and although B-to-C transactions are somewhat impaired, the net effect of this impairment is *less than* the positive impact on A-to-B transactions.

The purely theoretical description of aggregate alienability in this Section provides a basis for the discussion in the next Section. In it, we will apply the concept of aggregate alienability to the nuanced common law rules that determine the validity of privately-imposed alienability restraints. This application of aggregate alienability should help to clarify the abstract discussion in this Section.

## III. USING AGGREGATE ALIENABILITY TO UNDERSTAND THE LAW OF ALIENATION RESTRAINTS

The common law has developed a complex body of rules to determine the validity of privately-imposed alienability restraints. In this Section, we show how the concept of aggregate alienability explains the major rules in this body of law. For the first two rules discussed in Sections III(A) and (B), aggregate alienability turns on disparate effects within the transaction in which the restraint is imposed (what we have referred to as A-to-B transactions). For the last four rules discussed in Sections III(C)–(F), aggregate alienability turns on the disparate effect that different types of restraints have on subsequent transfers of the property interest in question (what we have referred to as B-to-C transactions).

### A. *Donative Transfers v. Non-Donative Transactions*

The first nuance of the law regarding the validity of alienability restraints concerns the distinction between "donative transfers" and "non-donative transfers." A donative transfer is a conveyance in which the grantor receives nothing in return for the transfer of his title.[26] A non-donative transfer is a transaction in which the grantor receives some form of consideration for his transfer of title.[27] The distinction between donative and non-donative transfers is generally recognized in the three Restatements of the Law for Property.[28] With regard to how this distinction affects the validity of restraints on alienability, the Second Restatement

26. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS Intro. (1983) (explaining difference between donative and non-donative transfers).

27. *See id.*

28. Both the *Restatement (Second) of Property* and the *Restatement (Third) of Property* address donative transfers as a separate topic. *See id.* (explaining why donative transfers were treated as separate topic); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS Intro. (2000) (same). The distinction between donative and non-donative transfers is also drawn in the initial Restatement, albeit in a more subtle fashion. *See* RESTATEMENT (FIRST) OF PROP. § 410 cmt. a (1944) (distinguishing validity of restraint on alienation of lease when restraint is imposed as part of "a business" transaction as opposed to another type of transaction such as donative transfer).

directly addresses the issue by indicating that restraints that are imposed within the context of non-donative transfers will be treated more permissively than restraints imposed within the context of a donative transfer.[29] The rule is perhaps most easily understood by stating it inversely to how it is articulated in the Restatement: alienation restraints are more likely to be stricken when they are imposed within a donative transfer.

The concept of aggregate alienability explains why courts are more likely to invalidate an alienation restraint imposed within a donative transfer. Because donative grantors are less likely (than non-donative grantors) to be chilled by a rule that invalidates their desired restraint, courts are more likely to invalidate a restraint in the donative context.

This idea is best understood by returning to the depictions that were used in Section II to explain the concept of aggregate alienability. Recall that a court's decision to invalidate an alienation restraint has inverse effects on two different types of transactions, as represented below:

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29. The Restatement articulates this concept in a somewhat obtuse manner. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS, pt. II, introductory note (1983) ("[T]he rules developed in this Part [concerning donative transfers], to the extent that they permit restraints on alienation, are equally permissive in regard to non-donative transfers."). Despite the clumsiness of this language, however, the point that restraints on alienation are more likely to be valid in non-donative transfers is relatively clear. *See, e.g.*, Procter v. Foxmeyer Drug. Co., 884 S.W.2d 853, 858 (Tex. Ct. App. 1994) ("In other words, if an alleged restraint on alienation is valid under the Restatement provisions, it is valid whether the transaction is donative or nondonative. The important implication of the quoted passages, however, is that the Restatement was not intended to address *unreasonable* commercial restraints on alienation. That is, an alleged restraint on alienation could be *invalid* in a donative context, but nevertheless be *valid* in a nondonative context."); *see also* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 4.1 cmt. d (1983) ("To the extent that a disabling restraint is found valid under [a donative transfer], it should likewise be found valid in a non-donative transfer."); *id.* § 4.1, statutory note 10 (1983) ("Recent developments in cases concerned with *commercial transfers* of property indicate that courts are increasingly willing to deal with disabling restraints on their individual merits rather than invalidating them wholesale, and will uphold such restraints if they leave available a means of current transfer and if under all the circumstances the legal policy favoring freedom of alienation does not reasonably apply." (emphasis added)). In addition, although the First and Third Restatements are less explicit in distinguishing between donative and non-donative transfers in their respective discussion of restraints on alienation, the analysis adopted in these Restatements nevertheless incorporates this distinction and confirms that the law is more permissive with regard to restraints on alienability for non-donative transfers. *See* RESTATEMENT (FIRST) OF PROP. § 410 cmt. a (1944) (stating that restraint imposed as part of "business" transaction is more likely to be valid as opposed to when restraint is imposed as part of donative transfer); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 cmt. b (2000) (explaining that validity of restraints imposed within donative transfer is not separately addressed in Third Restatement "because they are extensively treated in [the Second Restatement]"); *cf. id.* §3.5 cmt. b (explaining that indirect restraints on alienation are more likely to be upheld when restraints are imposed in commercial transaction as opposed to donative transfer).

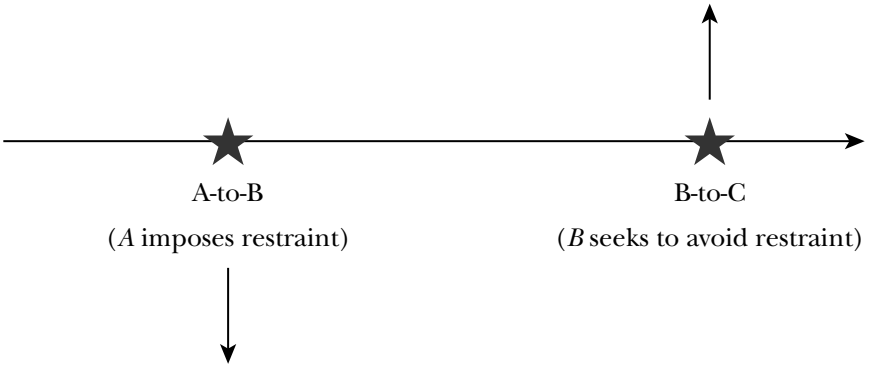


FIGURE G (RESTRAINT STRICKEN)

When a court decides to invalidate the alienation restraint (in the B-to-C transaction before the court), this permits the B-to-C transaction (and all similar transactions) to occur. This effect is represented by the "up" arrow in Figure G. The decision to strike the alienation restraint, however, will have some chilling effect on A-to-B transactions. If grantors in the position of *A* know that their desired alienation restraint will not be enforced, they might be dissuaded from entering into the A-to-B transaction in the first place. This effect is represented by the "down" arrow under the A-to-B transaction.

The chilling effect on A-to-B transactions is different when A-to-B involves a donative transfer rather than a non-donative transfer. For reasons explained below, striking down a restraint imposed within a donative transfer is going to have less of a chilling effect on future donative transfers than is striking down a restraint imposed within a non-donative transfer. Before proceeding to this explanation, this somewhat tricky notion is depicted in the two charts below.

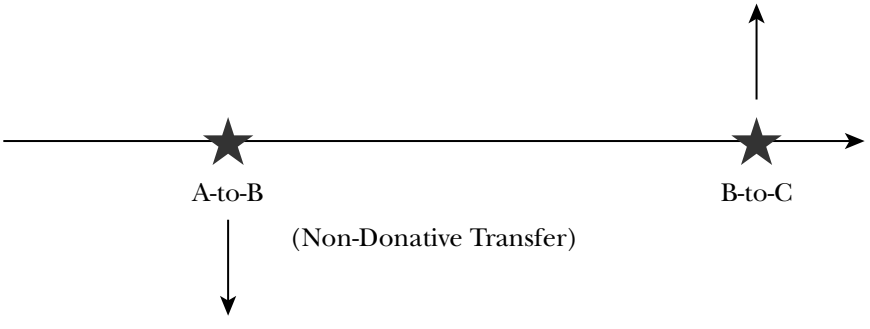


FIGURE H (RESTRAINT STRICKEN)

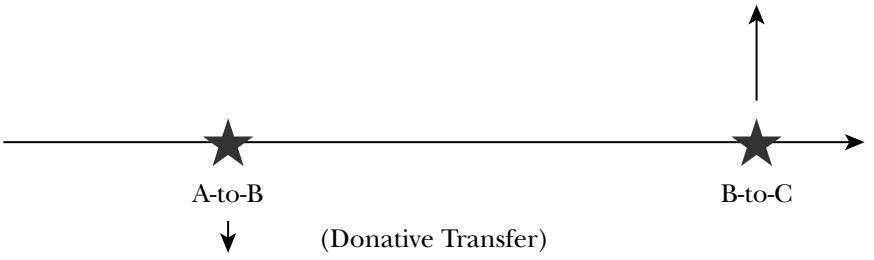


FIGURE I (RESTRAINT STRICKEN)

In Figure I, the reduced "down" arrow under the A-to-B transaction represents the diminished chilling effect that invalidating the restraint will have on A-to-B donative transfers. In Figure H, involving a non-donative transfer, the chilling effect on A-to-B transfers is more pronounced, as represented by the larger down arrow under the A-to-B transfer.

Why does a rule invalidating restraints imposed within a donative transfer have less of an effect on future A-to-B transfers than when the restraint is imposed within a non-donative transfer? This result becomes obvious when one considers that most donative transfers involve a probate transfer, at the donor's death, by virtue of a will. Striking down an alienability restraint in a will is not going to prohibit future will transfers. Simply put, in this context, the donor has no choice but to transfer his property. If he does not do so by a will, the state will apply its intestate succession law to accomplish this task for the donor. The probate donor is in a bad—indeed, the worst—of bargaining positions. When a restraint imposed in a non-donative transfer is stricken by a court, however, it is much more likely that there will be a chilling effect on future transactions. It is more probable that a living grantee in a non-donative transfer might decide to completely refrain from the transaction if he knows that his desired alienability restraint will not be enforced; a living grantee, as opposed to a probate donor, has this option.[30]

30. This analysis changes, of course, if the alienability restraint is imposed in a non-probate (an *inter vivos*) donative transfer. Here, at least, it is theoretically possible that the donative grantor might be inhibited if he knows that his desired alienability restraint will not be enforced. The extent to which someone contemplating an *inter vivos* gift of property might be chilled if he knows that his desired alienability restraint will not be enforced is somewhat difficult to gauge. In any event, the Restatement does not distinguish between probate and non-probate donors, probably because the number of *non-probate* donative transfers involving an attempted alienability restraint is probably relatively small compared to the volume of *probate* donative transfers involving an alienability restraint. For this reason, then, the justification for striking alienability restraints is sometimes articulated in terms of a reluctance to permit "dead hand" control of property. *See, e.g.*, Cast v. Nat'l Bank of Commerce Trust & Sav. Ass'n, 176 N.W.2d 29, 39 (Neb. 1970) ("The primary considerations underlying the prohibition against restraints on alienation is that they are economically undesirable and that the dead hand should not be allowed to control the living."), *opinion withdrawn and superseded on reh'g in part*, 183 N.W.2d 485 (Neb. 1971); Korngold, *supra* note 15, at 1553–54 (equating law's desire to preserve alienability of property with aversion towards "dead hand con-

To summarize, any time an alienation restraint is stricken, this positively affects alienation with regard to B-to-C transfers; striking the restraint, after all, allows B-to-C transactions to occur. This result, however, comes at the cost of chilling A-to-B transactions. When A-to-B transactions involve a donative transfer, however, the "costs" of striking the restraint are less pronounced than when the restraint is imposed in a non-donative transfer. As such, courts are more likely to strike an alienation restraint that is imposed within a donative transfer.[31] The objective of aggregate alienability necessitates this distinction within the law.[32]

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trol"). Even though the rules sticking restraints on alienability extends beyond situations in which those restraints are imposed within a probate transfer, the frequency with which this issue comes up in the probate context invites the equating of the separate goals of preserving alienability and limiting "dead hand" control.

31. It is worth mentioning one potential exception to the general rule that alienability restraints are more likely to be tolerated when imposed in a non-donative transfer. This potential exception involves donative transfers to a charity. Without question, courts are more likely to tolerate an alienability restraint if it is imposed in a donative transfer to a charity rather than a donative transfer to a non-charity. *See, e.g.*, RESTATEMENT OF PROP. § 406 cmt. i (stating that restraint imposed in transfer to charity is more likely to be enforceable); J.C. Vance, *Validity and Effect of Provision or Condition Against Alienation in Gift for Charitable Trust or to Charitable Corporation*, 100 A.L.R. 2d 1208 § 2 (1965) ("[A]n express provision or condition against alienation in a gift to a charitable trust or to a charitable corporation is an exception to the operation of the rule against restraints on alienation and constitutes a valid restraint."). Whether this generous treatment of restraints on the alienability of charities is strong enough that a restraint in a donative transfer to a charity would be treated more favorable than a restraint imposed within a non-donative transfer is not clear. In any event, although donative transfers to charities offer a potential exception to the distinction made in the text between donative and non-donative transfers, the reason that restraints imposed in transfers to charity are treated more favorably can still be understood in terms of the aggregate alienability concept. Because the law generally encourages donations to charities, it is more tolerant of restraints imposed within the context of a charitable donation, because of the inhibitive effect that a contrary rule might have. Here, aggregate alienability can be understood to incorporate not just the amount or frequency of transactions but the importance or nature of a particular transaction. *Cf.* David M. Becker, *A Methodology for Solving Perpetuities Problems Under the Common Law Rule: A Step-By-Step Process That Carefully Identifies All Testing Lives in Being*, 67 WASH. U. L.Q. 949, 1026 n.239 (1989) ("A gift to a single charity may tie up the subject matter indefinitely; despite this [technical violation of the rule against perpetuities], such gift is upheld because of a policy strongly favoring and encouraging charitable gifts.").

32. Additional considerations support the less favorable treatment of alienation restraints imposed within donative transfers. For one, the presence of a paying grantee ensures that the future costs of the restraint are taken into account when the restriction is created. In a non-donative transfer, the grantee that is buying the property interest is also the party who will be prohibited from alienating the property in the future. The grantee can anticipate this cost, but obviously believes that the benefits of going forward with the transaction (in which the grantee's alienation rights are restrained) are worth it, even though the grantee would obviously prefer to have full alienation rights. The grantee performs a cost/benefit analysis in deciding to go forward with the transaction, and the grantee's weighing process serves as a rough surrogate for the societal interests involved.

### B. *Leases v. Non-Leases*

The law regarding the validity of alienability restraints makes a sharp distinction between restraints imposed within leases as compared to other types of estates. Restraints imposed on a tenant by a landlord are treated much more favorably than restraints on non-lease estates;[33] in fact, there is a general presumption that a landlord's alienability restraint will be enforced.[34] Moreover, in some instances, a tenant is precluded from trans-

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Moreover, there are straightforward fairness arguments in favor of enforcing a restraint imposed within a non-donative transfer. When a grantor and grantee have entered into an arm's length transaction that involves a restraint on alienability, it can appear unfair to allow the grantee to be excused from the agreed-upon restraint. Presumably, the price that was paid to the grantor was discounted by the purported restraint on the grantor's ability to alienate the property. To excuse the grantee from the negotiated terms of the deal would grant the grantee a right that is negated in the written document and that was presumably not paid for by the grantee. *See* Alby v. Banc One Fin., 128 P.3d 81, 84 (Wash. 2006) (en banc) ("[C]ourts should be reluctant to invoke common law principles disfavoring restraints to invalidate a bargained for contract freely agreed to by the parties."). This concern, however, obviously does not apply to donative transfers. By striking restraints on alienation that are imposed within a donative transfer, the court does not permit the donee to acquire more rights than what was bargained for. Granted, the donee is given more rights than what was described in the instrument of conveyance, but the donee has not purchased these rights. The donor is, perhaps, frustrated that the gift involves more rights than what was intended to be transferred; this frustration is materially different, however, from the grantor-seller who accepted a discounted price because of the inclusion of a restraint on alienability, only to have this restraint invalided by the courts at a later time.

33. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 cmt. c (2000) ("Permissible restraints on alienation of leaseholds are often greater than on fee-simple estates . . . .").

34. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS div. I, pt. II, ch.4, introductory note (1983) ("Restraints on the alienation of tenants' interest in the landlord-tenant situation are widely used to give the landlord some additional assurance that the tenant of his choice will stay on the land perform the obligations of the lease. The validity of these restraints on the tenant is generally recognized."); RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 15.2(2) (1977) ("A restraint on alienation without the consent of the landlord of the tenant's interest in the leased property is valid . . . ."). It is common for leases to include a restraint on a tenant's right to alienate. *See* ERIC T. FREYFOGLE & BRADLEY C. KARKKAINEN, PROPERTY LAW: POWER, GOVERNANCE, AND THE COMMON GOOD 586 (1st ed. 2012) ("[M]any leases, both residential and commercial, provide that a tenant may not sublease or assign with the express consent of the landlord."). That the tenant's power to transfer the lease depends upon the landlord's consent does not alter the characterization of the restriction as an alienability restraint because even a flat prohibition on alienation can be waived (that is, consented to) by the grantor. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 cmt. d (2000) ("A prohibition on transfer of property without the consent of another is an unreasonable restraint on alienation unless there is a strong justification for the prohibition . . . .").

Some jurisdictions require that a landlord's refusal to consent to a transfer of a commercial lease be reasonable, unless the landlord's right to refuse for any reason is specifically reserved in the lease. *See, e.g.*, CAL. CIV. CODE §§ 1995.010–1995.270 (West 2015) (articulating California rule); Kendall v. Ernest Pestana, Inc., 709 P.2d 837 (Cal. 1985) (discussing same), *superseded in statute*, CAL

ferring her interest in a lease *by operation of law*, that is, even without an alienability restraint that is imposed by the grantor as part of the lease.[35]

At a surface level, it is relatively easy to see why restraints on a tenant's right to alienate are generally tolerated.[36] A landlord-tenant relationship is unique in that it will usually involve a continuing—and often personal—relationship between the holder of the future interest (the landlord) and the holder of the present interest (the tenant). First, of course, is the continuing obligation of the tenant to pay rent to the landlord. A landlord has a vested interest in leasing only to tenants who can meet the rent obligations under the lease and also in precluding transfers to people who cannot meet this obligation.[37] Conversely, a landlord has continuing obligations to the tenant involving repairs of the leased premises. Obviously, landlords have a vested interest in controlling to whom this obligation is

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CIV. CODE § 1995.270. The Restatement adopts this "minority" position and extends it to residential leases as well. *See* RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 15.2(2) (1977) (stating approach); *id.* § 15.2(1), reporter's note (acknowledging that Restatement position is "minority view"). *But see id.* illus. 8 (suggesting that landlord's refusal to consent to transfer is more likely to be reasonable in context of residential lease). The California and Restatement approaches can be viewed as an outgrowth of the widely accepted view that a landlord has a duty to mitigate a tenant's damages. JOSEPH W. SINGER, INTRODUCTION TO PROPERTY 470–71 (2d ed. 2005) (noting modern mitigation requirement). Because a landlord's duty to mitigate usually requires that the landlord act reasonably, a tenant who is "unreasonably" denied consent to transfer can essentially effectuate this same result by formally surrendering to the landlord and presenting the proposed transferee as a new tenant. *See Kendall*, 709 P.2d at 845 (noting how mitigation requirement of landlord leads to requirement that denial of attempted transfer be reasonable). Nevertheless, some jurisdictions have refused to require that a landlord's rejection of a proposed transfer of the lease be reasonable while simultaneously imposing a mitigation requirement on the landlord. *See* Vasquez v. Carmel Shopping Ctr. Co., 777 S.W.2d 532 (Tex. Ct. App. 1989) (explaining Texas law on these issues).

35. *See* RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT §15.1 (1977) (stating that tenants are usually entitled to alienate their interest (absent lease restraint on alienability), but providing exceptions); *see also* Joshua Stein, *Assignment and Subletting Restrictions in Leases and What They Mean in the Real World*, 44 REAL PROP. TRUST & ESTATE L.J. 1, 20 n.54 (2009) (listing states that preclude tenants from alienating their interest unless consent to transfer is given by landlord, even without lease provision requiring landlord's consent).

36. *See* JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 274 (3d ed. 1989) ("The reasons for such restrictions [on alienability in a lease] are fairly apparent.").

37. *See* RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 15.2(2) cmt. a (1977) ("The landlord may have an understandable concern about certain personal qualities of a tenant, particularly his reputation for meeting his financial obligations."). Although a tenant remains personally liable on the lease even after a transfer (absent a novation, see *id.* § 16.1 cmt. c (making clear continuing contractual liability of original tenant absent "release" or "novation")), a landlord would always prefer that the tenant in possession timely pay the rent rather than have to initiate a suit for recovery or ejection proceedings. In this sense, then, the landlord's interest that the lease only be transferred to financially capable transferees can be viewed in terms of a practical interest in avoiding costly, time-consuming, and potentially fruitless (if the original tenant is judgment proof) litigation.

owed. In addition, although the continuing relationship between all landlords and tenants is somewhat personal in nature, this aspect of the relationship can become even more pronounced with regard to leases involving residential property. Put simply, landlords will often be very picky in deciding who gets to possess "their" residential property, and rightly so.

The well-established rule that landlords can usually restrain the alienation rights of their tenants is sometimes explained as an *exception* to the common law's general goal of preserving the alienability of property.[38] The better explanation for this rule, however, is aggregate alienability. Because many landlords might simply refuse to lease their property if they could not control subsequent transfers of the leasehold interest, *aggregate* alienability is achieved (paradoxically) by allowing the landlord to *restrain* alienability. Indeed, the landlord-tenant context is probably the best example of why it is sometimes necessary to allow property to be restrained in order to achieve aggregate alienability.

This result is best illustrated by returning to the depictions developed in Section II. Recall that a decision to invalidate an alienability restraint has inverse effects on different types of transactions, as demonstrated in Figure J.

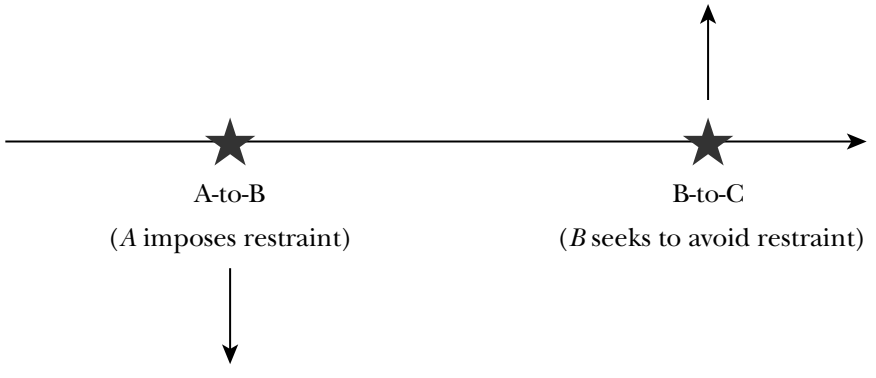


FIGURE J (RESTRAINT STRICKEN)

When the A-to-B transaction is a lease, however, the chilling effect on A-to-B transactions is more pronounced. Because of the continuing (and personal) nature of the landlord-tenant relationship, many landlords might choose to refrain from leasing their property if they know that they cannot prevent subsequent transfers of the leasehold interest. Thus, the chilling effect on A-to-B transactions is more dramatic when the property interest being restrained is a leasehold rather than a non-leasehold. Stated differently, the cost of striking a restraint (so as to permit B-to-C

38. *See, e.g.*, Julian v. Christopher, 575 A.2d 735 (Md. 1990) (conceding validity of alienability restraints when imposed within lease but discussing topic as if it is exception, rather than in furtherance, of goal of free alienation of property).

transactions) is much higher for leases than for non-leases. This result is depicted below in Figure K and Figure L.

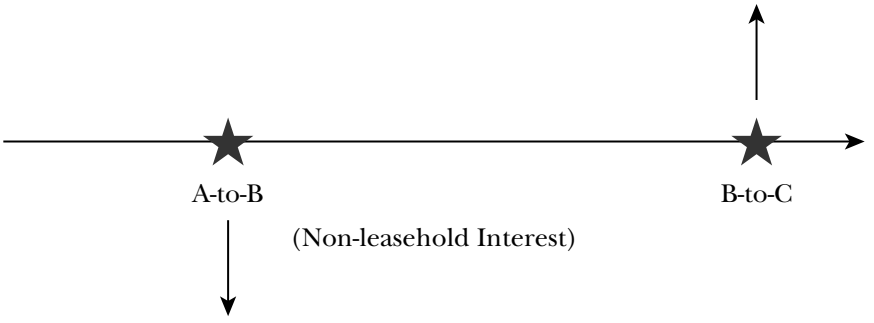


FIGURE K (RESTRAINT STRICKEN)

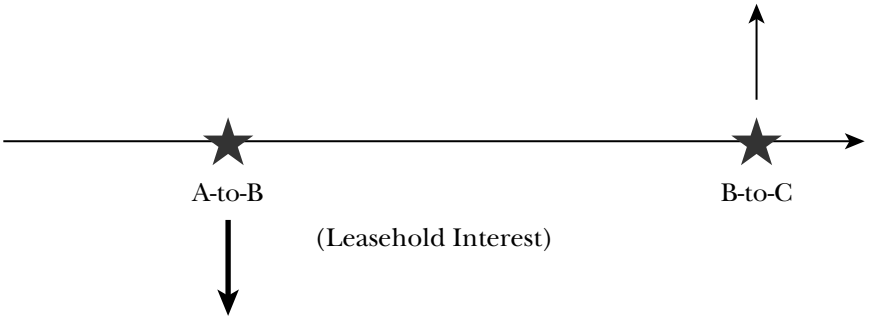


FIGURE L (RESTRAINT STRICKEN)

Because striking down an alienability restraint has disparate effects on grantors considering the conveyance of a lease and grantors considering the conveyance of another type of property interest, aggregate alienability requires that these two situations be treated differently. As such, restraints imposed upon leaseholds are treated differently and are almost always enforced.[39]

39. A lease will usually involve other factors that favor enforcement of the restraint on alienability. For instance, a lease almost always occurs as the result of a non-donative transfer rather than a donative transfer. *See generally supra* Part III(A). Moreover, a lease usually involves a shorter possessory estate as opposed to a longer possessory estate. *See, e.g.,* Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc., 826 P.2d 710, 719 (Cal. 1992) (noting that lease restraints exist only for limited duration of lease). *See generally infra* Part III(C). This overlap, however, should not obscure the fundamental distinction between leases and other possessory estates. Even controlling for other variables, the continuing relationship required between landlord and tenant justifies the enforcement of restraints on alienability under an aggregate alienability analysis.

### C. *Longer Estates v. Shorter Estates*

The type of estate on which the alienation restraint is imposed is a factor that is considered in determining the validity of the restraint. Generally speaking, a restraint is more likely to be upheld if it is imposed on a shorter estate and more likely to be stricken if it is imposed on a longer estate.[40]

This result can again be understood in terms of aggregate alienability. Unlike the discussion in the previous subsections (involving donative transfers and leases), however, here, the aggregate alienability analysis turns on the dissimilar results in the B-to-C transaction.

Recall that the decision to uphold and enforce a restraint, like the decision to invalidate a restraint, has inverse effects on different types of transactions. This result is depicted below in Figure M.

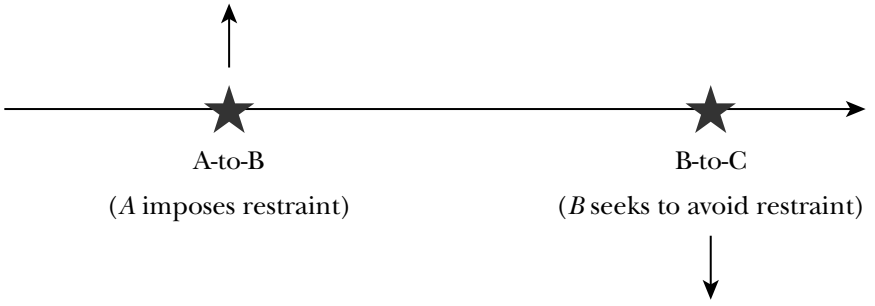


FIGURE M (RESTRAINT ENFORCED)

Obviously, upholding a restraint precludes the B-to-C transaction and all such similar types of transactions. This effect is represented by the down arrow under the B-to-C transaction. However, the decision to uphold the restraint has an inverse effect on A-to-B transactions. Because parties like *A* know that their desired restraint will be upheld, they are not discouraged from entering into A-to-B transactions.[41]

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40. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 cmt. c (2000) ("Generally, greater restraints are justified on estates of lesser duration than on estates of longer duration . . . ."); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 4.2 (1983) (permitting forfeiture restraints on life estates but invalidating them on fee simple estate); RESTATEMENT (FIRST) OF PROP. §§ 406, 409, 410 (1944) (imposing more lenient approach to validity of restraints on alienation of life estates and term of years than restraints on alienation of fee simple estates); DWYER & MENELL, *supra* note 7, at 185 (stating that restraints on fee simple estates are usually invalid, that restraints on life estates may be valid, and that restraints on "lesser interests" are usually valid).

41. Of course, parties in the position of *B* would prefer that the law not uphold the restraint. Thus, it is tempting to conclude that a decision to either invalidate or uphold the restraint will have no net effect on the amount of A-to-B transactions because under either legal rule (uphold or invalidate restraint) one party will get the result he wants. This line of thinking, we believe, is incorrect. There is a difference between (1) a party like *A* wanting a restraint, but being precluded from this option by a legal rule invalidating these types of restraints and

When a restraint is imposed on an estate of a longer duration, however, the effect of enforcing the restraint is more pronounced; the property is inalienable for a longer time period. Conversely, when the restraint is on a shorter estate, the cost of enforcing the restraint is reduced because the property is inalienable for a shorter period. This result is depicted in Figure N and Figure O.

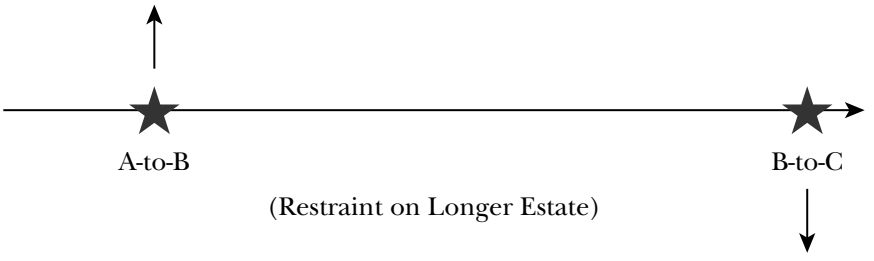


FIGURE N (RESTRAINT ENFORCED)

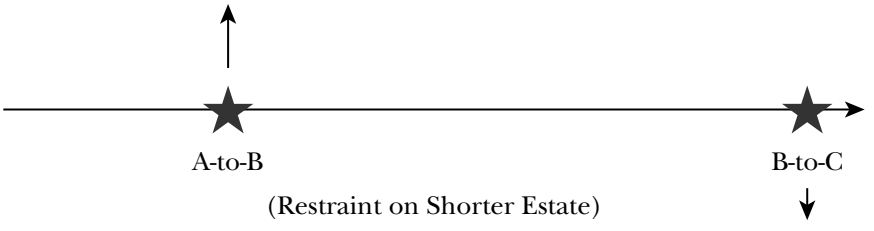


FIGURE O (RESTRAINT ENFORCED)

The aggregate alienability calculus is different in each of these scenarios. Because a greater number of potential transactions are foreclosed when the restraint is imposed on a longer estate,[42] the cost of enforcing

(2) a party like *B* desiring full alienation rights while *A* prefers restraints on *B*'s alienation rights. When the law *invalidates* a desired restraint on alienability, the parties' freedom to structure the parameters of the transaction as they desire (including, of course, the price that *B* will pay to *A*) is inhibited. If the law *permits* a restraint, the parties might disagree on whether the restraint will be included in the transaction, but they have the full range of options as to how to structure the transaction. *But cf.* CALVIN MASSEY, PROPERTY LAW: PRINCIPLES, PROBLEMS, AND CASES 136 (2012) ("But who in his right mind would pay to acquire an estate this is burdened with an absolute, or even very significant, restraint on alienation?"). Invalidating a restraint, then, will result in fewer A-to-B transactions because the parties' freedom to structure the transaction is inhibited. Upholding a restraint, however, will result in more A-to-B transactions, because the parties' freedom to structure the deal is maximized, even though each party has a different interest as to whether the restraint is included as part of the transaction.

42. Of course, there must be *some* mechanism for the transfer of a "long" interest that survives the death of its holder; otherwise, a grantee's interest would technically remain the property of the deceased. Thus, even a valid alienability restraint is not thought to preclude the interest from passing to the heirs of the deceased. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 3.1 illus. 1 (1983) (implying that even most "comprehensive as possible" alienability restraint

this restraint is higher. It is no surprise, then, that the law is more likely to invalidate the restraint that is imposed on a longer estate. Conversely, the cost of enforcing a restraint that is imposed on a shorter estate is smaller. The law, predictably, is more likely to enforce this type of restraint. Aggregate alienability compels this distinction.[43]

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must allow for transfer by intestate succession). In this way, at least, the interest will always be owned by a living person.

That an alienability restraint, even if valid, can never preclude an intestate transfer does not, however, change the conclusion that a restraint is more likely to be invalid if imposed on a longer estate. Thus, for instance, if a fee simple interest is impaired from both *inter vivos* alienation and testamentary alienation, and that restraint is enforceable, the interest is *forever* precluded from transfer except by decent to heirs. This situation would somewhat resemble the "fee tail" estate, which has been rejected in almost all American jurisdictions. *See* Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 U. CHI. L. REV. 1015, 1049–50 (2008) (explaining fee tail estate and its abolition by almost all American jurisdictions). On the other hand, a valid alienability restraint (both *inter vivos* and testamentary) of a shorter possessory estate does *not* preclude alienation *forever*; once that estate is extinguished (and this could conceivably be after the estate has passed by intestate succession, such as with a long term of years), the property would then become freely alienable again (assuming that no alienability restraint is imposed on the succeeding estate).

In any event, an alienability restraint clause will often be interpreted as the grantor's attempt to restrict only *inter vivos* transfers and not testamentary transfers via a will. *See, e.g.*, Merrill I. Schnebly, *Restraints Upon the Alienation of Legal Interests: II*, 44 YALE L.J. 1186, 1195 n.188 (1935) ("In a large number of the decisions holding restraints void, the language employed in the restraints did not expressly prohibit alienation by way of devise . . . ."). The primary problem with alienability restraints is that they prohibit *inter vivos* transfers, not that they require that the property pass upon death to the deceased's heirs rather than the deceased's devisees. *See id.* at 1195 ("It is the power of *inter vivos* transfer which is practically important [to the law governing the validity of restraints on alienation]."). *But see* RESTATEMENT (FIRST) OF PROP. § 406 illus. 5 (1944) (holding that restraints precluding only testamentary alienation of fee simple, and not *inter vivos* alienation, is invalid). After all, a grantor can validly preclude a grantee from *any* probate transfer at the grantee's death by limiting the duration of the grantee's estate, such as by creating a life estate in the grantee. For this reason, a discussion of the law of alienability restraints will often focus exclusively on *inter vivos* transactions and ignore testamentary transactions. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 cmt. b (2000) (stating that discussion includes "prohibitions on some or all types of transfers," but then mentioning only *inter vivos* transactions).

43. This analysis assumes that grantors contemplating the imposition of restraints on different types of estates will react similarly to a rule invalidating the restraints. If *only* the B-to-C transaction is considered (as in the text), the costs (in terms of the goal of maximum alienability of property) of enforcing a restraint on a fee simple are necessarily higher than the costs of enforcing a restraint on a shorter estate like a life estate, because the prohibition on the B-to-C transfer exists for a longer time period when it is imposed on a fee simple. It is theoretically possibly, however, that grantors of fee simples and life estates might react differently to a rule that invalidates the grantors' desired restraint. Thus, it is possible that grantors might continue to grant fee simple estates, even though they wish to restrain the alienability of that estate and even though they know that this desired restraint will not be enforced, while grantors of life estates will refuse to make conveyances of life estates unless they know the desired alienability restraint will be enforced. By considering this variable, the analysis as to whether to enforce a restraint on a life estate as compared to a fee simple becomes much more compli-

### D. *Disabling Restraints v. Promissory/Forfeiture Restraints*

The law governing the validity of alienability restraints has consistently maintained a sharp distinction as to the type of restraint involved. Three general categories of restraints have been recognized: disabling restraints, forfeiture restraints, and promissory restraints.[44] The difference between these three different types of restraints goes towards the repercussions that follow from a violation of the respective restraint. A disabling restraint is a restraint that purports to flatly prohibit or invalidate any subsequent transfer of the property.[45] A forfeiture restraint also restricts alienability but provides for a different remedy in the event of alienation: the interest is forfeited to either the original grantor (the person imposing the forfeiture restraint) or a third party.[46] A promissory restraint is conceptually different than the other two restraints in that its analytical foundations are rooted in contract law rather than property law. Under a promissory restraint, the grantee makes a promise that alienation will not occur.[47] If this promise is broken, the promisor-grantee is liable in con-

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cated, because the effect of each alternative (enforce or strike down the restraint) must be considered with regard to the empirical effect of both the B-to-C transaction *and* the A-to-B transaction, from the perspective of *each* estate. Nevertheless, the law seems to avoid this complexity by assuming that the grantors of each estate are just as likely to be chilled or encouraged by a law that either strikes down restraints or enforces them. The widely accepted black-letter law that restraints on greater estates are more likely to be stricken than restraints on lesser estates seems to assume that grantors in the A-to-B transaction will react similarly regardless of the type of estate being restrained. Although it is an empirical question that is probably almost impossible to test, it is the authors' opinion that the assumption on which the black-letter law seems to be based is almost surely accurate.

44. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS §§ 3.1–3.3 (1983); RESTATEMENT (FIRST) OF PROP. § 404 (1944) (making this distinction). The Third Restatement eschews this distinction in favor of an all-encompassing balancing test of "reasonableness." *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 (1983). Courts, however, continue to distinguish between disabling, forfeiture, and promissory restraints when determining the validity of an alienability restraint. *See, e.g.*, Alby v. Banc One Fin., 128 P.3d 81, 86–87 (Wash. 2006) (en banc) (Chambers, J., dissenting) (recognizing this distinction in context of determining validity of ability restraint); Vande Guchte v. Kort, 703 N.W.2d 611, 620–21 (Neb. Ct. App. 2005) (same).

45. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 3.1 (1983); RESTATEMENT (FIRST) OF PROP. § 404 (1944) (defining disabling restraint).

46. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 3.2 (1983); RESTATEMENT (FIRST) OF PROP. § 404 (defining forfeiture restraint). If the interest terminates in favor of the grantor, assuming the forfeiture restraint is valid, the grantee has an interest that is either determinable or subject to a condition subsequent. If the interest terminates in favor of a third party, and assuming the forfeiture restraint is valid, the grantee has an interest that is subject to an executory limitation. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 3.2 cmt. b (1983) (using "special limitation" instead of determinable, but stating similar concept).

47. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 3.3 (1983); RESTATEMENT (FIRST) OF PROP. § 404 (1944) (defining promissory restraint).

tract damages to the promisee-grantor, but the transaction in violation of the promise is not effected.[48]

The law governing the validity of these types of restraints is nuanced, but it is accurate to make the general observation that disabling restraints are usually invalid and that forfeiture and promissory restraints are more likely to be upheld than disabling restraints.[49] This result can again be understood in terms of aggregate alienability. Here, again, as with the distinction between longer and shorter estates, the inquiry involves what we have labeled as the B-to-C transaction. Because disabling restraints, by completely withholding from the grantee the power of alienation, completely foreclose the possibility of alienation by the grantee, enforcing them comes at a greater cost in terms of the B-to-C transactions that are precluded.[50]

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48. This straightforward conclusion is muddled somewhat by the fact that contractual remedies can sometimes include specific performance in equity, and that courts have occasionally enforced promissory restraints by an injunction precluding the promisor from alienating the property. When this occurs, a promissory restraint functions in a manner similar to a disabling restraint. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 4.2 cmt. a (1983) (explaining that specific performance might be used to enforce promissory restraints and similarity in effect to disabling restraints).

49. The First Restatement is unequivocal in invalidating disabling restraints, while the Second Restatement is (slightly) more tolerant. *See* RESTATEMENT (FIRST) OF PROP. § 406(a) (1944) (stating that alienability restraint is only valid if it is forfeiture or promissory restraint); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 4.1 (1983) (stating that disabling restraint is invalid if, by its terms, it makes alienation impossible, but providing that disabling restraints that provide process whereby alienation is possible (such as receiving consent of third party) can be valid in some circumstances); *id.* §§ 4.2–4.3 (providing balancing test to determine validity of forfeiture or promissory restraint).

50. When the grantee has no power to alienate, the interest held by the grantee passes to his or her heirs upon the grantee's death (assuming that the interest does not extinguish upon the grantee's death, such as with a life estate). *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 3.1 illus. 1 (implying that even most "comprehensive as possible" alienability restraint must allow for transfer by intestate succession). The interest received by the heirs would still be impaired by the disabling restraint against alienation if the law did not invalidate this type of restraint. A disabling restraint, then, "freezes" alienation for the duration of the estate.

There are some additional prickly issues that can arise under a disabling restraint. The conceptual basis for a disabling restraint is that the grantor has completely withheld the right to alienate. Using the familiar "bundle of rights" analogy, under a disabling restraint a grantor has granted the full bundle of rights but withheld the right to alienate. When a grantee nevertheless alienates, and litigation ensues, a court must grapple with some difficult conceptual issues. In one type of case, the *grantee* seeks to take advantage of the disabling restraint by denying the validity of a subsequent transfer. *See, e.g.*, Bouldin v. Miller, 28 S.W. 940 (Tex. 1894) (considering suit by party that had sold in violation of disabling restraint and was attempting to invalidate that transaction). Thus, if *O* conveys to *A* with a disabling restraint, and *A* then conveys to *B*, *A* will take the position in a dispute with *B* that no conveyance occurred because *A* did not have the power to alienate. To allow *A* to benefit from the disabling restraint becomes particularly problematic when one considers that *B* might be a creditor attempting to force a

With a forfeiture or promissory restraint, however, the validity of the restraint does not *completely* preclude subsequent transfers of the property.[51] When a grantee transfers in contradiction of a promissory restraint, the transfer is effective to convey the property interest, even though the transferor might be liable to the original grantor for contractual damages. Obviously, the potential existence of these contractual remedies might tend to inhibit the grantee from transferring in violation of the promissory restraint, but this inhibition is different in kind than the absolute prohibition on transfers that would occur if a disabling restraint was enforceable. Similarly, a forfeiture restraint does not completely forestall subsequent transfers of the restrained property. Granted, a forfeiture restraint will not usually allow the grantee to transfer to a person of his or her choosing, as an attempted transfer causes the interest to be forfeited.[52] That said, a grantee who truly wishes to disavow themself of the

sale of *A*'s interest. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 4.1 cmt. a (1983) ("Disabling restraints are especially objectionable because, if effective, they enable the person restrained to deny the validity of such person's own transfer, whether voluntary or involuntary."). In another type of case, the grantee alienates in violation of the disabling restraint, and it is the *initial grantor* who initiates litigation seeking to invalidate the transaction. *See, e.g.*, Pond Creek Coal Co. v. Runyan, 170 S.W. 501, 501–03 (Ky. 1914) (involving suit by original grantor when disabling alienability restraint was violated), *overruled in part by* Kentland Coal & Coke. Co. v. Keen, 183 S.W. 247 (Ky. 1916); Shields v. Moffitt, 683 P.2d 530, 534 (Okla. 1984) (same). It is somewhat difficult to conceptualize the basis of the grantor's damages and remedy in this situation. The grantor does not have a valid, present possessory interest in the land; this right was transferred to the grantee and has not been forfeited back to the grantor. Essentially, the grantor's suit, if asserted against the transferee, is seeking to restore or confirm the valid legal title in the grantee. The absence of a clear remedy or injury to the grantor in this type of suited has been noted by courts as a reason to invalidate disabling restraints. *See* Lohmann v. Adams, 540 P.2d 552, 556 (Okla. 1975) ("As a result disabling restraint provisions have been held void because there remains no one who has any beneficial interest in their enforcement which is not the case with forfeiture restraints."); *Bouldin*, 28 S.W. at 942 ("[W]hen there is no condition annexed to said estate. . . . [t]he first grantor could not complain because there would be no condition broken, and therefore no right of reentry in him; and the second grantor could not complain, because he would be estopped by his own conveyance. Thus, it appears that unlimited power of alienation exists in such cases . . . ."). Most often, it is the original grantee that comes to court asking for a declaration that the disabling restraint is invalid. *See, e.g.*, Riste v. E. Wash. Bible Camp, Inc., 605 P.2d 1294 (Wash. Ct. App. 1980) (involving suit by grantee seeking declaration that disabling restraint was invalid), *superseded in statute*, Garn–St. Germain Depository Institutions Act, 12 U.S.C. § 1701j-3 (1983). In these situations, the court can stave off the difficult remedy issues discussed above by accepting the grantee's request to have the disabling restraint declared void.

51. *See Real Property—Direct Disabling Restraints on Alienation Annexed to Legal Life Estates*, 41 TENN. L. REV. 364, 365 (1974) ("[Forfeiture and promissory restraints] fare quite well in the courts and are most often upheld, since they do not substantially impair alienation . . . ." (footnote omitted)).

52. The "usually" qualifier is necessary here because, in some instances, the forfeiture result is contingent upon the grantor enforcing that remedy, such as when the grantor retains a right of entry that must be exercised before it becomes possessory. This type of forfeiture provision is frequently used in leases because it

property can accomplish this result by attempting to alienate, resulting in a transfer to the party designated in the forfeiture restraint.[53] Thus, unlike with a disabling restraint, the property is not forever "frozen" by a forfeiture restraint; a party who wishes to rid herself of property ownership can accomplish this objective under a forfeiture restraint (and a promissory restraint), but that party cannot do so under a disabling restraint.[54]

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gives the landlord the option to either consent to the transfer (by doing nothing) or to exercise the right of entry, thus resulting in a forfeiture of all interests of the initial grantee and the transferee. *See* 10 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 77.01 n.6 (Michael Allan Wolf ed., LexisNexis Matthew Bender 2007) (noting that leases often include forfeiture alienability restraint that may be enforced at option of initial grantor-landlord). In this sense, then, it is theoretically possible that a grantee might be able to alienate to a party of her choosing, despite the existence of a forfeiture provision, if the grantee proceeds with the transfer and the grantor fails to enforce the forfeiture provision. *Cf.* William G. Coskran, *Assignment and Sublease Restrictions: The Tribulations of Leasehold Transfers*, 22 LOY. L.A. L. REV. 405, 487–94 (1989) (discussing California cases in which landlord elects not to pursue forfeiture, although most of cases discussed involved promissory restraint as opposed to forfeiture restraint).

53. Concededly, in most instances, a grantee will not be interested in transferring her interest just so that it will be forfeited to another party. *Cf.* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 4.2 cmt. a (1983) ("A person is even less likely to make a transfer in violation of a forfeiture restraint and thereby risk losing his interest entirely than he is to make a transfer in violation of a disabling restraint, since the result in the latter case [assuming the disabling restraint is enforced] is not the loss of his interest."). The point in this section, however, is that a forfeiture restraint makes it *possible* for a transferee to part with his interest. As it turns out, there *are* some instances in which a grantee might wish to rid themself of the burden associated with property ownership. This situation can arise when the grantee is a lessee who is obligated to perform various functions under the lease, such as the payment of rent. In this instance, the grantee-lessee might wish to effectuate a transfer of the interest so as to relieve themself of the lease obligations, *regardless* to whom the property is transferred.

54. Some commentators have argued that a forfeiture restraint encourages the payment of debts by the grantee because of the risk of forfeiture due to an attempted involuntary alienation by a creditor. *See* 6 A. JAMES CASNER, AMERICAN LAW OF PROPERTY § 26.50, at 487 (1952) ("While a forfeiture [restraint] in some instances may disappoint the expectation of creditors unaware of the restraint, usually the risk of loss of the property will suffice to induce the [grantee] to pay his debt if possible."). This assumes, of course, that a creditor would proceed with involuntary alienation proceedings that would not benefit the creditor, or that a grantee would pay his underlying debts so as not to be at the mercy of a creditor motivated solely by spite. Theoretically, a creditor in this position could use the threat of forfeiture to induce payment, although the grantee could call the creditor's bluff by inviting the creditor to initiate proceedings that will be of no use to the creditor. There is very little literature addressed to this aspect of a forfeiture restraint. *Cf.* Schnebly, *supra* note 42, at 977 (noting that, from perspective of creditors, forfeiture restraints function like disabling restraints in that it precludes transfer to creditor); *see also* Ronald H. Coase, *Blackmail*, 74 VA. L. REV. 655, 670 (1988) (describing similar "blackmail" situation in land-use context); *cf. The Scorpion and the Frog, Aesop's Fables*, AESOP'S FABLES http://www.aesopfables.com/cgi/aesop1.cgi?4&TheScorpionandtheFrog [http://perma.cc/33Q5-FU7V] (last visited Nov. 20, 2015) (telling fable of scorpion and frog).

Because disabling restraints completely foreclose subsequent transfers of the restrained estate, while promissory and forfeiture restraints provide at least some mechanism for the transfer of the estate by the grantee, the concept of aggregate alienability requires that these different types of restraints be treated differently. With regard to the B-to-C transaction, the costs of enforcing a disabling restraint are higher than the costs of enforcing a promissory or forfeiture restraint.[55] This result is depicted below in Figures P and Q.

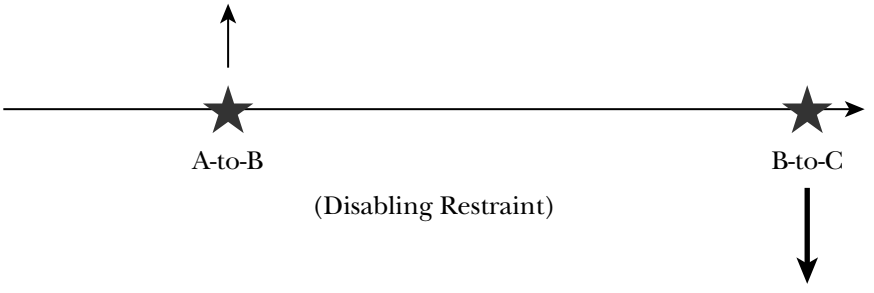


FIGURE P (RESTRAINT ENFORCED)

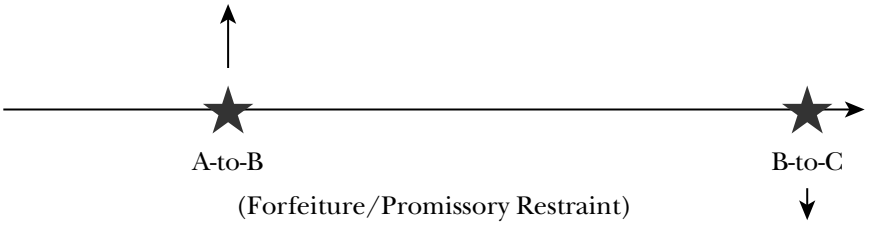


FIGURE Q (RESTRAINT ENFORCED)

Because of the more significant costs involved with enforcing a disabling restraint, aggregate alienability requires that these restraints be stricken more often than forfeiture and promissory restraints. This is precisely the result under the well-established black letter law in this area.

### E. *Absolute Restraints v. Partial Restraints*

The law regarding the validity of restraints on alienability has long distinguished between absolute restraints and partial restraints.[56] An ab-

55. Here again, the law presumes that the empirical effect on *future* A-to-B transactions, of a law that either enforces or invalidates an alienability restraint, will be the same for disabling restraints as compared to promissory or forfeiture restraints. *See supra* note 43.

56. *See, e.g.*, RESTATEMENT (FIRST) OF PROP. § 406(b) (1944) (stating that certain types of restraint are valid only if "the restraint is qualified so as to permit alienation to some though not all possible alienees"); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 cmt. c (2000) (stating that "nature, extent, and duration of the restraint are important considerations" in to determine validity of restraint).

solute restraint precludes all alienation,[57] while a partial restraint prohibits only certain types of alienation.[58] A partial restraint might prohibit alienation for only a certain time period, or to only a certain group of people, or prohibit only *inter vivos* transfers.[59]

The law regarding the distinction between absolute and partial restraints is clear: a partial restraint is more likely to be upheld than is an absolute restraint.[60] Here, again, the distinction drawn within the black-letter law can be understood in terms of aggregate alienability. The analysis here is very similar to that involving the duration of the estate (Subsection C) and the type of restraint (Subsection D); once again, the distinction drawn by the law has to do with the B-to-C transaction. An absolute restraint on alienation completely prohibits all B-to-C transfers; thus, the costs associated with enforcing this restraint are high. However, with a partial restraint on alienation, certain types of B-to-C transfers can occur, even if the restraint is enforced. Thus, for instance, if the partial restraint prohibits only conveyances to a small group of people, the benefits of enforcing the restraint (encouraging future A-to-B transfers that will only be made if the restraint is enforceable) are achieved at the relatively smaller cost of a partial impairment of B-to-C transfers.[61] This result is again depicted in Figures R and S below.

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57. The distinction between absolute and partial restraints should not be confused with the difference between disabling restraints and forfeiture/promissory restraints. The distinction between absolute and partial restraints has to do with the breadth of transactions that the grantor wishes to preclude. The distinction between disabling restraints and promissory/forfeiture restraints has to do with the remedy that follows from a violation of the grantor's restraint. Thus, one might have an absolute forfeiture restraint ("Blackacre is not to be sold, and if so, then to Willie"), or a partial disabling restraint ("Grantee has no power to sell to Cornhuskers, said right being retained by the Grantor"), or any other combination of the two distinct sets.

58. *See* Alfred L. Brophy & Shubha Ghosh, *Whistling Dixie: The Invalidity and Unconstitutionality of Covenants Against Yankees*, 10 VILL. ENVTL. L.J. 57, 61–62 (1999) (distinguishing between absolute and partial restraints on alienation).

59. *See id.* (discussing different types of partial restraints on alienation); *see also* PAUL GOLDSTEIN & BARTON H. THOMPSON, JR., PROPERTY LAW: OWNERSHIP, USE, AND CONSERVATION 625 (1st ed. 2006) (same); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 cmt. c (2000) (same); RESTATEMENT (FIRST) OF PROP. § 406, cmts. e–m (1944) (same).

60. *See* MERRILL & SMITH, *supra* note 9, at 535 (stating that absolute restraints on alienation are likely to be stricken but that partial restraints are valid if reasonable); Ronald C. Link & Kimberly A. Licata, *Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts*, 74 N.C. L. REV. 1783, 1815 n.192 (1996) (stating that absolute alienability restraints are more likely to be stricken than partial restraints on alienation).

61. The law here again assumes that future grantors desiring either a partial or absolute restraint will react similarly to a rule of either validity or invalidity. *See supra* notes 43 & 55.

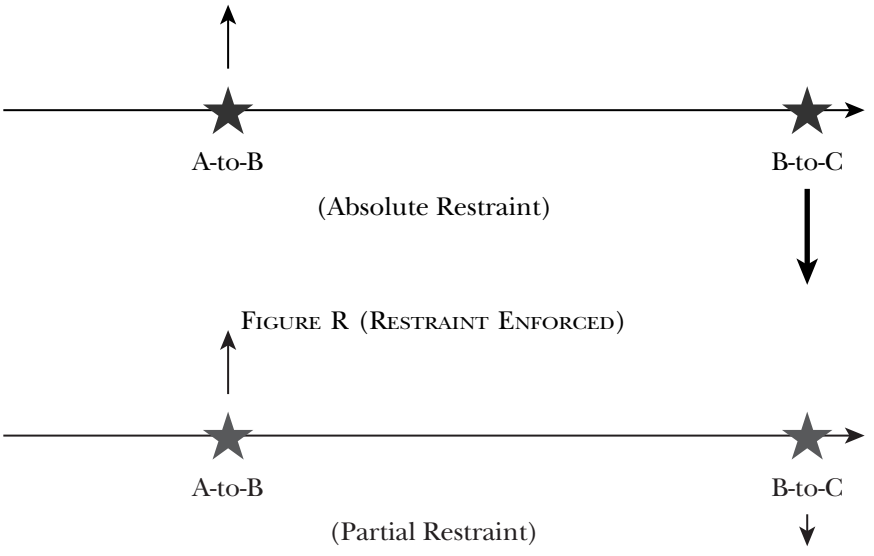


FIGURE R (RESTRAINT ENFORCED)




FIGURE S (RESTRAINT ENFORCED)

Aggregate alienability requires that absolute restraints be treated less favorably than partial restraints because enforcing absolute restraints has a more dramatic effect on B-to-C transfers than do partial restraints. This is the result under the common law.[62]

62. This analysis can also be used to explain the distinction made between direct and indirect restraints on alienability. This Article considers only direct alienability restraints, which, by their terms, prohibit some or all types of transfers. *See* Julia Patterson Forrester & Jerome Michael Organ, *Promising to be Prudent: A Private Law Approach to Mortgage Loan Regulation in Common-Interest Communities*, 19 GEO. MASON L. REV. 739, 764 (2012) ("A direct restraint is one that prohibits some type of transfer . . . ."). Direct restraints should be compared with indirect restraints, which impose restrictions on the grantees' use of the land or provide for the loss of the grantee's interest should a contingency occur. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 cmt. b (2000) (defining indirect alienability restraints). Indirect restraints are more likely to be enforced than are direct restraints. *Compare id.* § 3.4 (imposing a "reasonableness" requirement on direct restraints), *with id.* § 3.5 (upholding indirect alienability restraints so long as they are "rational"). This can be understood by comparing the likelihood that a direct alienability restraint, as compared to an indirect restraint, will foreclose future transactions (Transaction #2). *See id.* § 3.5 cmt. a ("Unlike direct restraints on alienation, which directly interfere with the process of conveying land . . . indirect restraints may have no overall negative effects . . . ."). Of course, in some instances, an indirect restraint can be written in such a manner as to have the same practical effect of a direct restraint, in foreclosing any transfer. *See, e.g.*, Mountain Brow Lodge No. 82, Indep. Order of Odd Fellows v. Toscano, 64 Cal. Rptr. 816 (Ct. App. 1967) (considering validity of conveyance that prevented any party other than grantor from using subject property). Here, though, administrative concerns often compel a court to ignore the practical effect of a draconian "use" restriction and instead to maintain the clearer distinction between direct and indirect alienability restraints. *See id.* at 25–26 (discussing administrative difficulty of distinguishing between permissible and impermissible indirect restraints); *see also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.5 cmt. a (2000) ("[C]ourts should

### F. *Legal Interests v. Equitable Interests*

The final major distinction made regarding the legality of restraints on alienability is that between legal interests and equitable interests. When a settlor creates a trust, he has divided the legal and equitable interests of the property that is placed in the trust. The legal interest (corpus) is owned by the trustee. This asset is managed for the benefit of the beneficiary. The equitable interest owned by the beneficiary usually constitutes the income from the corpus or principal; when the trust consists of real property, the equitable interest owned by the beneficiary includes the right to use and enjoy the subject property.[63]

The law is much more tolerant of a settlor's attempt to restrain the alienability of the beneficiary's equitable interest compared to a settlor's attempt to restrain the alienability of the trustee's legal interest.[64] Historical reasons dating all the way back to the distinction between law and equity partly explain this distinction,[65] which has been subject to severe criticism by some.[66] Despite the complexity of the issue, it is accurate to

not attempt to weigh the harm caused by an indirect restraint against the overall value of the transaction in which the [indirect restraint] played a part.").

63. *See generally* Robert T. Danforth, *Rethinking the Law of Creditors' Rights in Trusts*, 53 HASTINGS L.J. 287, 290–91 (2002) (describing basic concepts and terminology associated with trusts).

64. *See* Broadway Nat'l Bank v. Adams, 133 Mass. 170 (1882) (approving, in famous case, "spendthrift trust" in which settlor restrained alienability of beneficiaries' equitable interest); John K. Eason, *Retirement Security Through Asset Protection: The Evolution of Wealth, Privilege, and Policy*, 61 WASH. & LEE L. REV. 159, 166 n.18 (2004) (describing favorable treatment afforded to grantor's alienability restraint on trust beneficiary's equitable interest). In fact, a court will often conclude that certain types of trusts preclude assignment of the equitable interest by the beneficiary, even without a specific provision in the trust document to this effect. *See* Monday v. Vance, 49 S.W. 516, 518 (Tex. 1899) ("The very purpose of the deed in question was to provide a permanent support for the wife and children and the means of educating the latter. To permit an alienation of the interest of the beneficiaries is destructive of the trust and incompatible with its purposes. In such cases the authorities hold that there is no power of alienation, although no restrictions upon the power are expressed in the conveyance."); *see also* RESTATEMENT (SECOND) OF TRUSTS § 154 cmt. b (1959) ("In a trust for support it is the nature of the beneficiary's interest rather than a provision forbidding alienation which prevents the transfer of the beneficiary's interest. The rule stated in this Section is not dependent upon a prohibition of alienation by the settlor . . . ."); *id.* § 155 cmt. b ("In a discretionary trust it is the nature of the beneficiary's interest rather than a provision forbidding alienation which prevents the transfer of the beneficiary's interest. The rule stated in this Section is not dependent upon a prohibition of alienation by the settlor . . . .").

65. For a superb discussion of the history of the American position tolerating restraints on equitable interests, see generally Alexander, *supra* note 14, at 1189–1266 (tracing several historical trends in analytical foundations and justifications for law involving restraints on alienability).

66. These criticisms were most famously asserted by renowned scholar John Chipman Gray. *See* JOHN CHIPMAN GRAY, *Preface to the Second Edition*, RESTRAINTS ON THE ALIENATION OF PROPERTY v–xii (2d ed. 1895) (offering spirited critique of then-developing rules that permitted restraints on alienability of equitable interests).

state the general proposition that the law is much more tolerant of restraints on an equitable interest than restraints on a legal interest.

This result can, again, be explained pursuant to aggregate alienability. When a restraint is imposed only upon an equitable interest, the trustee is nevertheless free to sell the legal interest in the property to a third party, thus changing the corpus or principal to which the beneficiary holds the equitable interest.[67] In this way, then, society's goal of allowing property to transfer on the market to the highest and best user is achieved. The cost of enforcing a restraint on alienability is much more dramatic when the restraint is imposed on a legal interest rather than an equitable interest. As such, the concept of aggregate alienability compels the law to be more tolerant of restraints on equitable interests. This result is depicted below.

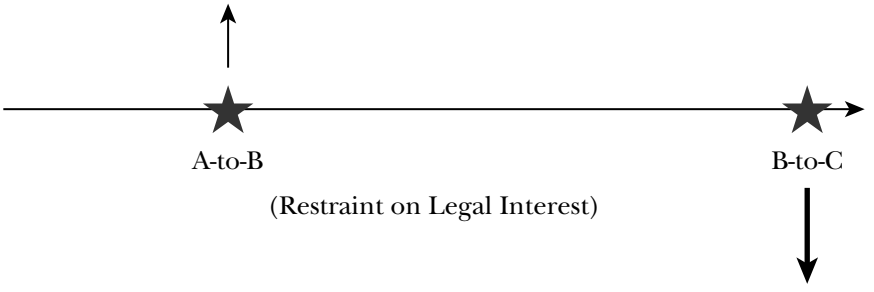


FIGURE T (RESTRAINT ENFORCED)

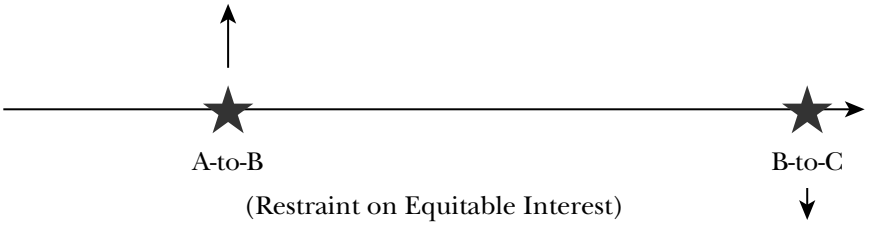


FIGURE U (RESTRAINT ENFORCED)

## IV. CONCLUSION

The objective of this Article is not to suggest that the common law of alienability restraints is the product of judges performing the detailed empirical calculations suggested by the explanation of aggregate alienability herein. Rather, our thesis is that judges have been guided by a rough sense of how particular rules might affect aggregate alienability. As a re-

67. *See* Scott Andrew Shepard, *A Uniform Perpetuities Reform Act*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 89, 116–17 (2013) (describing how trust's split between legal and equitable title, and trustee's power to sell legal interest, resolves many of the policy concerns regarding alienability of property).

sult of these rough estimates, a complex body of common law rules has developed over time. Applying this law to new disputes requires that the analytical foundations of this body of law be properly understood.