

Distributive Liberty: A Relational Model of Freedom, Coercion, and Property Law

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## NOTES

### DISTRIBUTIVE LIBERTY: A RELATIONAL MODEL OF FREEDOM, COERCION, AND PROPERTY LAW

This Note explains why social reform should be pursued through reconfiguration of basic property rules in addition to tax-and-transfer redistribution. It first provides a theoretical account of how law interacts with economic power to produce a person's freedom, understood as that person's capacity to develop and effectuate a life plan. The Note then explores, through an historical application of the theory, how changes in property rules redistribute liberty, as well as material well-being.

The argument begins with the proposition that human beings can be understood neither as individuals wholly separated from their social and physical environment nor as ants in an anthill, wholly determined by their environment. Instead, human beings should be understood to be living through a constant dialectic of separateness and union, a dialectic of "relationality." From this proposition, the Note argues that liberty cannot be understood in terms of the formally unbounded, self-determined choice of a single individual. Instead, liberty must be understood as effective constitutive choice — the capability a person has to develop and pursue a life plan of her own, given the role that relationships play in constituting her life choices.

Relationships constitute a person's life choices in two ways. First, relationships construct the framework of knowledge within which the person must develop his will and aspiration. Second, a person's capacity to effectuate choices is limited by the choices of others with whom the person interacts. Effective choice is a function of the relative power people can exert over each other to produce and resist will-constructing knowledge. It is also a function of one's capability to resist the power of others and to move others to make room, to create a space in the real world for one's own will.

The relational emphasis on freedom as a function of one's position of power or vulnerability vis-à-vis others in society makes it insufficient to speak of law and freedom in terms of the formal constraints that law directly imposes on the subject. Law's effects on freedom are not limited to its "thou shalt" and "shalt not" commands. Instead, it is necessary to understand how law affects the power that individuals can exert over each other in the various contexts through which they live. This Note develops an approach to analyzing law, in particular property law, in terms of its effects on power, and through power, on freedom.

In claiming that the configuration of property law — the organization of power over economic resources — is profoundly part of liberty, the relational approach offered here questions the centrality of the distinction between liberty and distributive justice prominent in liberal political thought.<sup>1</sup> It suggests that lexical preference of negative liberty and political rights over economic positioning is based on too narrow a picture of law's effects on liberty, and that the distributive effects of law extend to liberty itself, as well as to wealth.

This relational approach also requires a modification of economic analysis of law. Economic analysis assumes that individuals develop preferences independently of each other, and that their capability to fulfill those preferences depends on the correlation between each one's preferences and the autonomous preferences of others — supply and demand. This “positive” model claims ethical neutrality, because it formally respects the autonomy of individual preferences. In order to understand preferences as autonomous, however, one must accept the normative conception of the human subject as a self-originating being. The relational model proposed here is similarly a “descriptive” model, but it is based on a relational understanding of human beings. It explains people's actions not only by reference to their preferences, but also by reference to relationships of power and vulnerability that pervade and partially determine the actual choices available to them. By refocusing the description of human interactions on power, this Note adopts a position that validates some configurations of relations and criticizes others. This relational approach is ethically loaded, because it recognizes that freedom, not merely fulfillment of commensurable preferences, is at stake in configurations of economic relations.

Recognition of this interrelatedness of freedom and economic relations was at the root of the agitation for homesteading in the 1840s and 1850s. For fifteen years, the National Reformers sought to implement a Jeffersonian vision of liberty by making freehold farming a viable alternative life plan for industrial wage laborers. To give Eastern laborers the effective capability to choose a life of farming, National Reform combined free land grants with restraints on alienation, use limitations and requirements, and restraints on accumulation. How could these restrictive reconfigurations of property rights operate to enhance effective choice? Why were free land grants insufficient to fulfill the Reformers' program? Are transfer payments, the modern

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<sup>1</sup> See Kenneth R. Minogue, *The Concept of Property and Its Contemporary Significance*, in NOMOS XXII: PROPERTY 3, 3–4 (J. Roland Pennock & John W. Chapman eds., 1980). Prominent examples are ISAIAH BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 118, 118–72 (1969); FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 85–102 (1960); and, ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 149–275 (1974). Even Rawls, who focuses on distributive justice, asserts the lexical priority of liberty over justice. See JOHN RAWLS, *A THEORY OF JUSTICE* 243–51 (1971).

equivalents of free land grants, similarly unable to produce an adequate level of effective choice without supplemental reconfiguration of property rights? In order to answer these questions, it is necessary to have an account of how law affects effective choice, and of what are the effective choices that must be enhanced in order to produce freedom.

Parts I, II, and III develop the relational approach to property law. Parts IV and V explain how the restrictive elements of National Reform interacted with free land grants to produce freedom, in the relational sense of effective choice.

### I. PROPERTY, RELATIONALITY, AND EFFECTIVE CHOICE

At the core of contemporary critiques of liberalism lies an understanding of the human subject that “oscillat[es] between visions of the self as separated from and in union with others.”<sup>2</sup> This dialectical account juxtaposes itself to the individualist account of the self-originating subject on the one hand,<sup>3</sup> and to Marxist determinism on the other.<sup>4</sup> Following the individualist account of the self, orthodox property law seeks to identify a subject, who holds all the rights to an object as a freeholder.<sup>5</sup> Property theory corollaries of the relational critique of individualism supplant this orthodox account with institutional designs that mediate the dialectic of separateness and union.<sup>6</sup>

<sup>2</sup> Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 277 (1991).

<sup>3</sup> See Michael Sandel, *Introduction to LIBERALISM AND ITS CRITICS* 1, 5–6 (Michael Sandel ed., 1984). On the juxtaposition of a relational self rooted in “I speak therefore I am” to Cartesian solipsism, see JUDITH N. SHKLAR, *FREEDOM AND INDEPENDENCE* 14–16 (1976).

<sup>4</sup> See, e.g., ROBERTO M. UNGER, *FALSE NECESSITY* 41–44, 96–115 (1987) (suggesting “reasonless routine” as an alternative to dialectical materialism).

<sup>5</sup> This conception of property is plain in Blackstone’s “sole and despotic dominion which one man claims and exercises over external things of the world, in total exclusion of the right of any other individual in the universe.” 2 WILLIAM BLACKSTONE, *COMMENTARIES* \*2. The term “freehold,” rather than “dominion,” refers to the composition of:

[T]he right to possess, the right to use, the right to manage, the right to income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary.

A.M. Honoré, *Ownership*, in *OXFORD ESSAYS IN JURISPRUDENCE* 107, 113 (A.G. Guest ed., 1961). Despite its oversimplicity, this conception still operates as a background understanding of property. See ALAN RYAN, *PROPERTY* 54 (1987) (“A legal order recognizes ownership in the full modern sense when [Honoré’s 11 incidents] are assigned to a single person.”); Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1189 n.1 (1985) (explaining the liberal tendency of legal rules to concentrate property rights, powers, and privileges in a single individual). Even the more sophisticated accounts of property as a “bundle of rights” that can be parcelled out share the notion that these rights are derivations from an original bundle — the freehold.

<sup>6</sup> Examples of this literature are: Margaret J. Radin, *Market Inalienability*, 100 HARV. L.

Adherents of the relational approach differ in their institutional proposals and in their conceptions of which relations are operative.<sup>7</sup> Two propositions, however, unite relational understandings of property. First, the relational approach expresses liberty in terms of effective choice rather than formal choice. Relationality rejects separateness as the state of human being. It expands Coasean reciprocal causation<sup>8</sup> to all human choices, so that no choice is free-standing. Rather, a person's choice, *a*, is always made in context of other people's choices, *b . . . n*, which make possible or restrict *a*, and are similarly affected by *a*. Relational approaches therefore express freedom as the effective capacity to develop<sup>9</sup> and effectuate<sup>10</sup> will, given the pervasiveness of constitutive and restrictive relationships. The second proposition common to authors in the relational vein is that reconstitution of basic property rules can produce freedom.<sup>11</sup> This

REV. 1849 (1987) [hereinafter Radin, *Market Inalienability*]; William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335 (1991); and, Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988). Radin explored relational theories of property without focusing on restrictive rules in Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); and Margaret J. Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350 (1988). Other relational explorations of property include JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1988); and Jennifer Nedelsky, *Law, Boundaries and the Bounded Self*, 30 REPRESENTATIONS 162 (1990). The relational legal conception of property builds on the Hohfeldian critique of jural relations. See Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: THE CRISIS OF LEGAL ORTHODOXY 1870-1960*, at 151-56 (1992).

<sup>7</sup> Simon, Radin, and Singer, for example, present three aspects of relationality. Simon's relationality is political — "active participation in a group or community constituted by the property." Simon, *supra* note 6, at 1336, 1339-40. For Radin, "connections between the person and her environment are integral to personhood." Radin, *Market Inalienability*, *supra* note 6, at 1904; see also NANCY J. CHODOROW, *FEMINISM AND PSYCHOANALYTIC THEORY* 154-62 (1989) (linking object-relations psychoanalysis to a social relational understanding of the subject). Singer argues for a social-historical relationality, which situates people in "relationships with others that continue over time." Singer, *supra* note 6, at 653-55.

<sup>8</sup> See Ronald Coase, *The Problems of Social Cost*, 3 J.L. & ECON. 1, 2 (1960).

<sup>9</sup> The notion of the relational sources of will harks back to the Hegelian notion of *Bildung*, see, e.g., WALDRON, *supra* note 6, at 361-63, 369-70 (linking his developmental theory of property to Hegelian embodiment); Radin, *Market-Inalienability*, *supra* note 6, at 1904-06 (arguing that stabilizing the environmental and communitarian contexts is necessary to "proper self-development," and may justify overriding "momentary desires and preferences"), and to Aristotelian perfectionism, see Martha Nussbaum, *Comments*, 66 CHI.-KENT L. REV. 213, 220-22 (1990).

<sup>10</sup> Simon asks whether a person can participate effectively in the polity, given other people's economic power over him or "his" representatives. See Simon, *supra* note 6, at 1339-41. Singer seeks to enable a person effectively to shape the relationships in which he participates, given the power of others to force him into relationships that take a form different from what he would have chosen had he been free from their power. See Singer, *supra* note 6, at 659-63.

<sup>11</sup> Simon argues that everyone should be provided with property, and that the use, transfer, and accumulation of property be restricted in order to retain the political good of roughly equal property holdings by all members of the community. See Simon, *supra* note 6, at 1341-49.

proposition recommends programs that reconfigure jurial relations so that everyone has less “choice,” in the sense of formally unfettered action with respect to whatever one happens to own. Within the reconstituted frameworks, however, those who in the existing framework are less able to develop will and effectuate choice would have greater capacity to do so.

## II. LAW, POWER, AND FREEDOM

Expressing freedom as a function of law requires an account of the power that people have to affect each other's capacity to develop and effectuate will, and of the effects of legal rules on that power. The model that explains this interaction between law, power, and freedom builds on Hale's account of the world as an arena of private mutual coercion pervaded by public bestowal of unequal coercive power upon various private actors through law in general, and property law in particular.<sup>12</sup>

An individual choosing to act is limited in the exercise of his choice by the behavior and choices of others, and similarly limits others.<sup>13</sup> All people, however, cannot affect each other's behavior equally. *A*'s capacity to limit *B*'s effective choice — *A*'s power vis-à-vis *B* — is a function of *A*'s capacity to withhold a resource from *B* that is necessary for *B* to fulfill his choice. *A*'s capacity to withhold the resource partially depends on *A*'s and *B*'s legal rights, powers, privileges, and immunities with respect to the resource, and partially depends on *B*'s power vis-à-vis *A*, defined symmetrically. This set of relations describes the parties' “bargaining power” over each other. Bargaining power is a function of the initial distribution of resources, the legal

Radin suggests limiting the fungibility of those relations with material objects that constitute the self by restraining their alienability through monetized market transactions. See Radin, *Market-Inalienability*, *supra* note 6, *passim*. Singer, who focuses on plant closings as a “concrete, historically situated social problem,” Singer, *supra* note 6, at 643, advocates proposals ranging from minor use requirements (requiring notice of plant closing or sharing of information with workers) to significant restraints on alienation (workers' right of first refusal in sale of a plant, forced sale of the plant to workers if management fails to negotiate in good faith, and right of entry for waste), *id.* at 740–44.

<sup>12</sup> See ROBERT L. HALE, *FREEDOM THROUGH LAW, PUBLIC CONTROL OF PRIVATE GOVERNING POWER* at vii–viii, 1–12 (1952); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 603–07 (1943); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 471–75, 478 (1923); see also Warren J. Samuels, *The Economy as a System of Power and Its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261, 276–344 (1973) (systematizing Hale's work into a general equilibrium economics based on power, not supply and demand); Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327, 328–41, 347–61 (1991) (explaining Hale's approach and expanding it to all human relations by combining it with Foucault's insights into the omnipresence of power).

<sup>13</sup> See Samuels, *supra* note 12, at 276–87.

rules governing what each can do with his resources, and each party's staying power, defined by each party's capacity to avoid the transaction altogether. The final distribution of resources resulting from their transaction is a function of their relative bargaining power. The transaction has changed the power position from which each participant will transact in the next transaction. This new distribution of power reflects and solidifies the original inequality of power.

Power is positional. It is not something one simply "has." It is a function of withholding capacity and staying power, defined contextually — withholding from someone, avoiding transaction with someone at a particular time over a particular object of will. Freedom within a relational model is, at least partially, a function of one's capacity to move others to act or to abstain from action in a way that makes room for one's will, and of one's capacity to resist similar impositions by others. Because freedom is a function of power, it too is positional. Freedom is not something one simply has or lacks. Rather, it is a continuous expression of one's position in the various contexts through which one lives. Accounts of freedom that do not consider the effects of law in all human relations, but focus solely on one sphere of relations — direct interactions with the state apparatus, for instance — are partial.

Private law affects one's power position in three ways. First, law identifies the parties to a transactional context. Assume, for example, that *A* wants to eat corn and there is only one cornfield within walking distance. A state coercive agency will only heed the call of the legal owner of that cornfield, making her *B*, the person wielding withholding power over *A*'s will. Second, law directly affects withholding power by defining what *A* and *B* can do to each other. For example, if necessity is a defense to trespass, and *A* is starving, *B* may not be able to withhold the corn from *A*. Finally, law determines staying power, or the capacity effectively to threaten not to enter into the transaction at all. If, for instance, the law reserves a commons upon which landless people may grow vegetable gardens, *A* has a viable alternative to eating *B*'s corn, and *B*'s power over *A* is thereby diminished. By identifying the transactional contexts one lives through and structuring the relative bargaining power of the participants in these contexts, law affects an individual's freedom no less than do the resources one controls or the rights one has vis-à-vis the state.

### III. FREEDOM AS CONSTITUTIVE EFFECTIVE CHOICE

Freedom in a relational model must account for two divergences from the individualist, self-originating subject. First, the relational model posits a self constituted by its relationships. This entails a complex account of will as constantly developing through the rela-

tionships of the subject. There is no single moment of will that can be identified as uniquely "the individual's." Power is always involved in the production of will, through education (or propaganda), inculcation, submission, or resistance. The question of freedom is focused on how one is empowered to participate in structuring one's will. Second, the relational model recognizes that difference is partially a product of power. It treats differences in conceptions of the good life and in the capability to effectuate one's chosen life plan neither as marks of desert nor as morally arbitrary facts. Instead, it treats differences as products of human relationships that may require institutional remedies to institutionally produced disadvantage.

A relational account of the subject must include an account of will that is constituted by, rather than prior to, a person's relationships. That means that there is no "will" that can be identified as "really" the individual's, and as such privileged relative to all other sources of impulses that drive a person to behave. One's refusal to wear a seat belt is no more free than one's wearing a seat belt under pain of traffic fines. Both, in a relational account of the self, are volitional acts brought on by a contingent coalescence of relationships. The refusal to wear a seat belt is no less an outcome of socialization than is wearing the seat belt. Over time, as wearing the seat belt becomes more of a habit than self-conscious submission to authority, it becomes willed in much the same way that culturally habituated resistance to "paternalistic" regulation is willed by Americans more than by citizens of other industrialized nations.

As the seat-belt example suggests, the developmental notion requires that will be understood as an interaction between power and knowledge. Being able to  $X$  depends first on knowing that  $X$  is something human beings can and may wish. Knowledge, in turn, is affected by one's position in the world — who has power to shape one's knowledge, whose knowledge one has power to shape.

Power and knowledge interact to shape one's aspiration and will, which in turn affect one's power. If  $A$  does not know that  $X$  is a possible way of living,  $A$  will not develop a will to  $X$ , and will not develop a relationship with  $B$  that will allow  $A$  to  $X$ . For example, migrant workers' capability to resist abusive labor relations is partially a function of their capacity to imagine a better set of relations. That capacity to imagine is constituted by the power to produce the framework of knowledge within which they can develop their aspirations. A rule privileging labor organizers to enter upon an employer's land in order to educate the workers about the possibility of different labor relations would affect the power relations involved in the production of knowledge. It would determine how deeply the employer can control the universe of information available to the workers. By regulating the power relations involved in the production of knowledge

and aspiration, the law would affect the power of migrant workers to achieve better working conditions.<sup>14</sup>

Once a person develops a will, a relational account of freedom focuses on whether that person can effectuate that will. Recognizing human singularity, relationality focuses on the capability to choose between different life plans,<sup>15</sup> different constitutions of the self, each of which is composed of a set of functionings — beings and doings.<sup>16</sup> These functionings are not always compatible or mutually supportive, so that a person's life plan is the vectorial sum of the directional pulls that one's functionings exert over the constitution of one's being.<sup>17</sup>

The focus on capability to effectuate one's life plan, rather than on the absence of formal constraints on adopting and pursuing a life plan, is rooted in understanding human heterogeneity as a product of relationships. With respect to effective choice of life plans, people differ at two levels.<sup>18</sup> First, they have diverse conceptions of the good life. Second, people have different capacities to convert resources under their control into actual sets of functionings that comprise alternative life plans. The earlier discussions of the role of power in people's capability to develop and effectuate will demonstrate that *each of these diversities is partially a function of the subject's power position*. The power people exert over each other's aspirations affects the diversity of their conceptions of the good. Difference in people's capability to convert resources into actual sets of functionings are partially produced by the limits people place on each other while pursuing their respective life choices.

Two treatments of human difference compete with the position offered here: first, the notion that difference reflects desert;<sup>19</sup> and

<sup>14</sup> Cf. *State v. Shack*, 277 A.2d 369, 374 (1971) (privileging providers of aid to farm workers to enter upon the employer's land in order to aid migrant workers).

<sup>15</sup> The term "life plan" is appropriated from CHARLES FRIED, *RIGHT AND WRONG* 123–26 (1978). The term is used here to invoke two emphases in Fried's discussion. First, that having a life plan entails both development and pursuit of a conception of the good life. See *id.* at 123. Second, that respect for life plans entails respect both for the capacity to develop a life plan and for the capacity to realize that plan. See *id.* at 124.

<sup>16</sup> See AMARTYA SEN, *INEQUALITY REEXAMINED* 39–42 (1992). Martha Nussbaum draws a detailed list of human functionings from what she terms a "thick vague" conception of the self. See Martha Nussbaum, *Aristotelian Social Democracy*, in *LIBERALISM AND THE GOOD* 203, 205, 217–26 (R. Bruce Douglass, Gerald M. Mara & Henry S. Richardson eds., 1990). Most important about her list is that it is composed of "being able to do and be," rather than of "being," "doing," and "having." See *id.* at 217–26. Freedom is thus the capability effectively to choose among sets of functionings, rather than having some functionings, but not others, thrust upon one by external forces. See *id.* at 214; SEN, *supra*, at 39–40, 49–53.

<sup>17</sup> See SEN, *supra* note 16, at 40.

<sup>18</sup> See *id.* at 85.

<sup>19</sup> See NOZICK, *supra* note 1, at 153–64.

second, the notion that difference is arbitrary.<sup>20</sup> Difference-as-merit prescribes a minimally level playing field in which we admire those players who can develop and effectuate the most attractive life plans. Arbitrary difference eschews this admiration, and treats people's different capabilities to develop and pursue a life plan as good or bad luck. It suggests an actuarial theory of justice, in which redistributive transfers are justified as a premium that rational actors would pay to insure themselves against bad luck in the distribution of capability. Relationality suggests that difference is partly caused and sustained by the power people exert over each other. The relational account explains that, no matter whether or not people deserve their economic position at any given time, they use differential positioning to solidify and extend any advantage that their position affords them. Difference and disadvantage at any given moment in time are therefore at least partially a product of how people have used their positions in previous times to exert power over others. Under this explanation, differences become the morally relevant products of human relationships institutionalized through law. They militate examination of how the capability of some participants in society to develop and effectuate life plans is suppressed through the process by which others reproduce and solidify their own capability.

Recognition of the role of law in the production of freedom, and understanding freedom as effective choice, explain why social reform should include reconfiguration of basic property rules, as well as tax-and-transfer redistribution. First, by pervading knowledge, power affects aspiration and the development of will. Tax-and-transfer merely fulfills preexisting needs. It gives a person the fungible resources with which to pay for what her position has partially forced her to aspire to. Changes in property rules, on the other hand, can resituate people in positions that allow them greater freedom to become. Second, the diversity of individual conversion functions suggests that simply "giving" people "stuff" does not necessarily equalize their capacity to be free. People with diverse conversion functions may need different arrangements for the production of effective choice, rather than more resources to control. "More" is not necessarily "better."<sup>21</sup> Rules affecting *how* one has, what one's withholding and staying power are, and who is "in" or "out" of a given context, are as important to one's freedom as *what* one has.

Parts IV and V will show how relationality can explain and justify a reform program that sought to produce more freedom for Eastern industrial workers by combining government subsidies — free land grants — with reconfiguration of property rules.

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<sup>20</sup> See RAWLS, *supra* note 1, at 100–08.

<sup>21</sup> See Nussbaum, *supra* note 16, at 210–11.

#### IV. NATIONAL REFORM AND THE JEFFERSONIAN POLITICAL ECONOMY OF LAND: A RELATIONAL PROGRAM

Two stories are told of the Homestead Act of 1862. One is a story about a land management policy, one of many policies the federal government employed during the nineteenth century "to raise public funds from the sale of land, and . . . to get the land into private hands."<sup>22</sup> The other is the story of the National Reformers, who sought to use the public lands to implement a republican political economy.<sup>23</sup>

Whereas other programs that gave actual settlers preferred access to land originated in the West, homesteading was a program of New York worker advocates<sup>24</sup> known as "National Re-

<sup>22</sup> Howard W. Ottoson, *Foreword* to LAND USE POLICY AND PROBLEMS IN THE UNITED STATES at v, v (Howard W. Ottoson ed., 1962). Treatment of the Homestead Act as a land management policy can be traced to Paul W. Gates, *The Homestead Law in an Incongruous Land System*, 41 AM. HIST. REV. 652 (1936). Gates self-consciously broke from traditional historiography of the Act by analyzing the Act as one continuous with other land management legislation. See *id.* at 652. His analysis represented a shift from a political-ideological focus to a more "administrative" analysis, a common shift in the New Deal *zeitgeist* of justifying redistribution by bureaucratizing it. See HORWITZ, *supra* note 6, at 213-25. (Gates completed the article as a researcher for the Federal Agricultural Adjustment Administration.) Gates further developed his approach in PAUL W. GATES, PUB. LAND LAW REVIEW COMM'N, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 177-218 (1968); and Paul W. Gates, *The Homestead Act: Free Land Policy in Operation, 1862-1935*, in LAND USE POLICY AND PROBLEMS IN THE UNITED STATES, *supra*, at 28. Others who have followed Gates are LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 416-19 (1985); IRVING J. SLOAN, 1 AMERICAN LANDMARK LEGISLATION 3-75 (1976); and, Thomas Le Duc, *History and Appraisal of U.S. Land Policy to 1862*, in LAND USE POLICY AND PROBLEMS IN THE UNITED STATES, *supra*, at 3, 3-27.

<sup>23</sup> The major political economic accounts of the Homestead Act predate Gates's 1936 article. See GEORGE M. STEPHENSON, THE POLITICAL HISTORY OF THE PUBLIC LANDS FROM 1840 TO 1862, at 97-117, 132-43 (1917); BENJAMIN H. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 347-85 (1924); ROY M. ROBBINS, OUR LANDED HERITAGE, THE PUBLIC DOMAIN 1776-1936, at 92-206 (1950); Roy M. Robbins, *Horace Greeley: Land Reform and Unemployment, 1837-1862*, 7 AGRIC. HIST. 18, 22-41 (1933) (Robbins's 1950 book relies heavily on his 1933 reading of the Act); St. George L. Sioussat, *Andrew Johnson and the Early Phases of the Homestead Bill*, 5 MISS. VALLEY HIST. REV. 253, 266-70, 276-83, 285-86 (1918). Later accounts are WILLIAM B. SCOTT, IN PURSUIT OF HAPPINESS, AMERICAN CONCEPTIONS OF PROPERTY FROM THE SEVENTEENTH TO THE TWENTIETH CENTURY 53-70 (1977); and ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 26-29 (1970).

<sup>24</sup> The clearest example of a failure to differentiate the Eastern from the Western impulses of the Homestead Act is Irving Sloan's legislative history. See SLOAN, *supra* note 22, at 3-74. Sloan presents the Act as the direct descendent of Thomas Hart Benton's graduation policy, see *id.* at 23, which provided that the minimum price for public land be reduced over time, according to how long the land remained unsold. "Refuse" that remained unsold would be granted free to settlers. See HIBBARD, *supra* note 23, at 290-91. Graduation thus treated land as a commodity, and used the surplus for charity. Reformers opposed graduation because they wanted to decommodify land. See Sioussat, *supra* note 23, at 270, 265-66. In effect, graduation

formers."<sup>25</sup> The Reformers advocated changing the property regime in public lands. They argued that the government should cease to sell public lands in fee simple, and should instead grant rights of occupancy to settlers, free of charge.<sup>26</sup>

National Reform was a relational program in three senses. At the theoretical level, it was based on the republican conception of the human subject as "a citizen who achieve[s] his greatest moral fulfillment by participating in a self-governing republic."<sup>27</sup> At the programmatic level, Reformers relied on Jeffersonian proposals that the state provide all men with the land necessary to enable them to be good citizens in a pastoral republic of yeoman farmers.<sup>28</sup> This program-

massively privatized land and produced little income for the government. See GATES, *supra* note 22, at 186-89.

Despite the different impulses, converging interests in free land grants to actual settlers produced an East-West coalition against mounting Southern opposition. One explanation for Southern coalescence against homesteading after 1852 is the adoption of homesteading by Free Soilers, Free Democrats, and the Republican Party. See STEPHENSON, *supra* note 23, at 192-201; Fred A. Shannon, *The Homestead Act and the Labor Surplus*, 41 AM. HIST. REV. 637, 643 (1936); Sioussat, *supra* note 23, at 284. The House vote on Johnson's 1852 bill was the last time Southerners supported homesteading. See Shannon, *supra*, at 642-43. In the 1852 House debates, Orin Fowler of Massachusetts directly linked homesteading to emancipation, see CONG. GLOBE, 32d Cong., 1st Sess., app. 396 (1852), and three months later the Free Democratic Party adopted homesteading in its platform, see FREDERICK J. BLUE, *THE FREE SOILERS: THIRD PARTY POLITICS 1848-54*, at 241-44 (1973). Southerners may also have feared that "homesteads would culminate in a practical restriction of slavery, by surrounding the South with a wall of non-slaveholding farmers." JAMES D. BILOTTA, *RACE AND THE RISE OF THE REPUBLICAN PARTY, 1848-1865*, at 416 (1992) (quoting Horace Greeley).

<sup>25</sup> To avoid confusion, it is important to note that National Reformers were distinct from the Free Soilers. Free Soilers coalesced around the Wilmot Proviso, which focused on keeping slavery from expanding to newly settled lands. See JOHN MAYFIELD, *REHEARSAL FOR REPUBLICANISM: FREE SOIL AND THE POLITICS OF ANTI-SLAVERY 80-125* (1980). Although Free Soilers demanded in their platform "Free Grant to Actual Settlers," *Free Soil Platform of 1848*, reprinted in BLUE, *supra* note 24, at 293, 295, the demand was intended merely to placate Land Reformers, who were outsiders at the Free Soilers' 1848 Buffalo convention, see JOSEPH G. RAYBACK, *FREE SOIL: THE ELECTION OF 1848*, at 219 (1970), and who rejected the Free Soilers' formulation as inadequate, see *id.* at 264-65; STEPHENSON, *supra* note 23, at 136-37.

<sup>26</sup> See Sioussat, *supra* note 23, at 266-67 (quoting an April, 1844 letter to James K. Polk, then the Democratic candidate for the Presidency). Three months later, the Union of National Reformers published its commitment to "the right of the people to the soil; to be used by them in their own day, and transmitted — an inalienable heritage — to their posterity." WORKING MAN'S ADVOC., July 6, 1844, reprinted in 7 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 293, 301 (John R. Commons, Ulrich B. Phillips, Eugene A. Gilmore, Helen L. Sumner & John B. Andrews eds., 1958) [hereinafter DOCUMENTARY HISTORY]. Within a year, Horace Greeley took up the cause of land reform and became its most prominent proponent in the late 1840s and 1850s. See 8 DOCUMENTARY HISTORY, *supra*, at 40-43.

<sup>27</sup> Gordon S. Wood, *Classical Republicanism and the American Revolution*, 66 CHI.-KENT L. REV. 13, 23 (1990).

<sup>28</sup> Small freehold farming was central to Jefferson's political economy. See RICHARD K. MATTHEWS, *THE RADICAL POLITICS OF THOMAS JEFFERSON 27-29, 31-52* (1984); GARRETT W. SHELDON, *THE POLITICAL PHILOSOPHY OF THOMAS JEFFERSON 55-62, 72-78* (1991); Wood,

matic commitment involved two relational aspects. First, Reformers believed that freehold farming enhances an individual's capability to develop an independent will, because, unlike the industrial worker, the farmer is not subject to the overbearing power of another.<sup>29</sup> This aspect is equivalent to the relational concern with the freedom to develop a will. Second, Reformers were well attuned to the role of property law in determining the power relations among its subjects and the life choices available to them.<sup>30</sup> Much of the institutional program of National Reform was intended to make farming a possible life plan for Eastern workingmen who would otherwise be effectively unable to choose farming as an alternative to industrial wage labor.

#### V. THE NATIONAL REFORM PROGRAM: RECONFIGURING PROPERTY IN PURSUIT OF LIBERTY

The National Reformers' program primarily addressed two power relationships. First, it was concerned with the declining power of labor in the East. Free homesteads would allow some workers to become farmers, while strengthening the bargaining power of those

*supra* note 27, at 26. The notion of limiting the right to land to a right of occupancy and use for life, as opposed to a perpetual fee title, is also traceable to Jefferson, *see* MATTHEWS, *supra*, at 19, and was elaborated in THOMAS SKIDMORE, *THE RIGHTS OF MAN TO PROPERTY!* 39, 119–25 (Thomas Skidmore, New York 1829). Skidmore is widely considered to have influenced the National Reformers. *See* GATES, *supra* note 22, at 390; Sioussat, *supra* note 23, at 267–68.

National Reformers often resorted to republican images of pastoral yeomanry. Greeley advocated land reform because it would “rapidly cover the yet unappropriated Public Domain with an independent, substantial yeomanry.” Horace Greeley, N.Y. WEEKLY TRIB., Jan. 26, 1846, *quoted in* Robbins, *supra* note 23, at 25. The pastoral impulse of the land reformers is most evident in Lewis Masquerier's notion of “a rural city of the whole earth.” LEWIS MASQUERIER, *SOCIOLOGY: OR THE RECONSTRUCTION OF SOCIETY, GOVERNMENT, AND PROPERTY* 13 (Lewis Masquerier, New York 1877). Masquerier had been one of the original Reformers, *see* Sioussat, *supra* note 23, at 267 n.42; 7 DOCUMENTARY HISTORY, *supra* note 26, at 305. This pastoral image was also expressed in *Proposed Bill for Congress*, YOUNG AM., Sept. 23, 1848, *reprinted in* 7 DOCUMENTARY HISTORY, *supra* note 26, at 313.

<sup>29</sup> Visions of the connection of homesteading to personal development are found throughout the debates over homestead bills. Andrew Johnson argued in 1850: “[Y]ou have made the man a better citizen of the community. He becomes qualified to discharge the duties of a freeman. He comes to the ballot-box and votes without the restraint or fear of some landlord.” CONG. GLOBE, 31st Cong., 1st Sess. app. 951 (1850). Johnson later argued in favor of giving 160 acres to the “landless, homeless man . . . that he may live upon it and cultivate it, and thereby become an independent man and an efficient citizen.” CONG. GLOBE, 31st Cong., 2d Sess. app. 313 (1851).

<sup>30</sup> “Talk not of free agency,” said Galusha Grow in 1852, “to him whose only freedom is to choose his own method to die.” CONG. GLOBE, 32d Cong., 1st Sess. app. 428 (1852). “The struggle between capital and labor,” he said, “is an unequal one at best. It is a struggle between the bones and sinews of men and dollars and cents. . . . And in that struggle, is it for this Government to stretch forth its arm to aid the strong against the weak?” *Id.* at 427.

left behind.<sup>31</sup> Second, Reformers were concerned with the power of settlers relative to railroads and other large landholders in the West. Most of the restraints on accumulation, alienation, and use that the Reformers proposed can be understood as attempts to counteract the withholding capacity of large landowners and to extend the staying power of settlers in order to make small freehold farming a viable alternative life plan.

### *A. Free Homesteads and the Labor-Capital Relationship*

National Reform was sparked by the Panic of 1837 and the fear that industrial relations in the United States would follow the pattern of England in the Industrial Revolution.<sup>32</sup> Free land grants<sup>33</sup> increased the staying power of laborers by eliminating the start-up capital entry barrier to farming, and thereby enhanced the effective availability of homesteading as an alternative to industrial wage labor. Manufacturers would still have withholding capacity within one possible set of functionings, industrial labor, but they would no longer be able to withhold the entire universe of possible sets of functionings. The workers would gain an expanded capability set. In being able to choose farming as a life plan, they would have more freedom.

### *B. Restraining Accumulation to Ensure Free Land*

The withholding capacity of manufacturers in the East was only one side of the liberty equation. The other, more central aspect, was

<sup>31</sup> See WORKING MAN'S ADVOC., *supra* note 26, at 293–305; ROBBINS, *supra* note 23, at 99–102. Representatives of capital used this theory to attack homesteading. See CONG. GLOBE, 32d Cong., 1st Sess. 729–38 (1852), *reprinted in* 8 DOCUMENTARY HISTORY, *supra* note 26, at 67, 69–70 (statement of Rep. Sutherland of New York). This relationship was expanded in Turner's safety valve theory, which attributed to free lands the role of generating the alternative to repressive relationships in the East. See FREDERICK J. TURNER, *Contributions of the West to American Democracy*, in THE FRONTIER IN AMERICAN HISTORY 243, 259–60 (Univ. of Ariz. Press 1986) (1920).

<sup>32</sup> See ROBBINS, *supra* note 23, at 97–99. Reformers believed that, because of mechanization and immigration, the East was experiencing a labor surplus similar to England's. See WORKING MAN'S ADVOC., *supra* note 26, at 295–305; ROBBINS, *supra* note 23, at 101.

<sup>33</sup> Almost all homesteading bills proposed in Congress provided free land to actual settlers. See, e.g., H.R. 294, 29th Cong., 1st Sess. (1846); H.R. 319, 29th Cong., 1st Sess. (1846); H.R. 329, 29th Cong., 1st Sess. (1846); H.R. 34, 31st Cong., 1st Sess. (1850); H.R. 140, 31st Cong., 1st Sess. (1850); H.R. 141, 31st Cong., 1st Sess. (1850) [hereinafter Moore Bill]; H.R. 7, 32d Cong., 1st Sess. (1852); H.R. 24, 36th Cong. 1st Sess. (1860). Only the Senate and compromise bills of 1860 attempted to substitute free land for a 25 cent per-acre charge. See S. 1, 36th Cong., 1st Sess. (1860); S. 416, 36th Cong., 1st Sess. (1860). The compromise bill passed both Houses of Congress, but President Buchanan vetoed it, arguing that the price was too low. See ROBBINS, *supra* note 23, at 180–81; SLOAN, *supra* note 22, at 74.

the withholding capacity of large landowners in the West. The code words "speculation" and "monopolization" reflected a concern over land concentration and the withholding power that landowners could exert by limiting the effective capacity of others to choose a life of farming.<sup>34</sup> If, for example, a railroad owned a large portion of the land adjacent to its tracks and a town, the railroad would have had substantial withholding capacity vis-à-vis the settler. Although land may have been available elsewhere, the relative advantages of town and transportation became the object over which the railroad had withholding power, reproducing the disparity in power that free homesteads were initially intended to eradicate.<sup>35</sup>

Accumulation would tend to nullify the freedom produced by free land grants, because it would reproduce a community in which large landowners have great withholding power over settlers. In order to avoid accumulation, National Reformers deployed three types of institutions: first, termination of land sales; second, perpetual restraints on resale and devolution; and third, use requirements and restraints on alienation during the period of required residency and cultivation.

1. *Terminating Sales.* — Terminating sale of land was the Reformers' first means to combat accumulation.<sup>36</sup> Since the beginning of the nineteenth century, public lands in the West were predominately disposed of at auction.<sup>37</sup> As Galusha Grow observed, the capacity to bid in an auction was a function of one's opening distributive posi-

<sup>34</sup> "[T]he master evil, a monopoly of land by those who do not use it, tends ever to sink the landless multitude into a state of more abject dependence, while it restricts the demands for and the price of their sole commodity and resource." HORACE GREELEY, *HINTS TOWARDS REFORMS* 314 (Fowlers & Wells, New York 2d ed. 1855). This tension between the promise of abundance and land for all who could labor, and large uncultivated estates in a number of states (most prominently in New York and Pennsylvania) had fueled redistributive theories and attempts at confiscatory land taxes since the early 18th century. See SCOTT, *supra* note 23, at 18–23; see, e.g., SKIDMORE, *supra* note 28, at 59–62 (arguing that land accumulation curtailed the pursuit of happiness by forcing the propertyless into wage labor).

<sup>35</sup> Cf. GATES, *supra* note 22, at 397 (describing a railroad company's land sales pamphlet that explained to settlers the advantages of its land over land open to homesteading in terms of transportation and potential appreciation).

<sup>36</sup> "Section I: Be it enacted . . . that the lands of the United States shall no longer be sold." *Proposed Bill for Congress*, *supra* note 28, at 313; see also WORKING MAN'S ADVOC., Nov. 30, 1844, reprinted in 7 DOCUMENTARY HISTORY, *supra* note 26, at 317 ("[T]he system of Land Traffic imported to this country from Europe is wrong in principle . . ."); Horace Greeley, in N.Y. WEEKLY TRIB., Mar. 6, 1847, at 3, reprinted in 8 DOCUMENTARY HISTORY, *supra* note 26, at 43 ("I. Let the Public Lands, whether of the Union or of any State, be disposed of to Actual Settlers only."); SCOTT, *supra* note 23, at 62 (discussing termination of sales of land to non-settlers as a programmatic component of land reform). Of all the bills, only the Moore Bill, cited above in note 33, attempted to curtail sales to non-settlers by significantly increasing the price of public lands to purchasers who refused to certify that they intended to settle the land and to resell no part of it, see *id.* § 5.

<sup>37</sup> See GATES, *supra* note 22, at 125–218; SCOTT, *supra* note 23, at 59; Le Duc, *supra* note 22, at 7–8.

tion.<sup>38</sup> This power of speculators at auctions is an excellent example of how prior economic positioning is solidified and reproduced in subsequent transactions. Termination of land sales was an attempt to block this process of solidification and reproduction of power in order to enhance the capability of potential settlers to choose farming as a life plan.

2. *Limiting Resale and Devolution.* — Restraints on alienation permitted resale of farms solely to landless persons,<sup>39</sup> or made title to a tract defeasible upon accumulation, through devolution or purchase, of more than 160 acres.<sup>40</sup> These restraints would produce freedom in two ways. First, in the short to intermediate term, restricting plot size and limiting accumulation by resale was thought to ensure an abundance of land necessary to maintain an effective capability to choose farming as one's life plan.<sup>41</sup> Second, the vision of a community of small farms contemplated high staying power (each member would have enough land to live on) and small withholding power (no one would have excess land to stop others from settling). The result would be a relatively high level of capability to decide how to apply one's productive labor. "More" choice (to sell to anyone as opposed to selling only to landless persons) could lead to less freedom in the long run by allowing accumulation of withholding power in the hands of a few, who would then be able to restrict the freedom of others.

3. *Use Requirements and Temporary Restraints on Alienation.* — The requirement to reside and cultivate for a period prior to receiving

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Now, when a new tract is . . . exposed to sale, the man with the most money is the largest purchaser. The most desirable and available locations are seized upon by capitalists . . . who seek that kind of investment. Your settler who chances not to have a preemption right . . . must pay the speculator three or four hundred percent on his investment . . . [a]nd thus, under the operation of laws that you call equal and just, you take from the settler three or four dollars per acre, and put it in the pocket of the speculator. Thus, by the operation of your law, abstracting so much of his hard earnings for the benefit of capital.

CONG. GLOBE, 32d Cong., 1st Sess., app. 427 (1852) (emphasis added) (statement of Rep. Galusha Grow of Pennsylvania).

<sup>39</sup> See *Proposed Bill for Congress*, *supra* note 28, §§ 6, 7, at 314.

<sup>40</sup> See *Proposed Bill for the States*, YOUNG AM., Sept. 23, 1848, §§ 2, 4, reprinted in 7 DOCUMENTARY HISTORY, *supra* note 26, at 316, 316–17; GREELEY, *supra* note 34, at 314–15; Greeley, *supra* note 36, at 43 ("4. Take from no man that which is lawfully his; but let him who falls heir to lands above the legal maximum be required to sell the excess to some one who has less within a year after coming into possession."). The Moore Bill, cited above in note 33, granted homesteaders a fee defeasible upon accumulation of more than 160 acres by the settler. Regardless of how the settler came by the land or where the land was situated, the settler lost title unless, within six months, he sold the excess land to a landless person. See *id.* § 3.

<sup>41</sup> George Henry Evans envisioned a situation in which population growth would require redivision into smaller plots to continuously allow effective capability to farm. See SCOTT, *supra* note 23, at 62. This perception of abundance could not, however, have been sustained without ignoring the rights of Native Americans. See Joseph W. Singer, *Re-Reading Property*, 26 NEW ENG. L. REV. 711, 718–22 (1991); Joseph W. Singer & Jack M. Beermann, *The Social Origins of Property*, 6 CANADIAN J.L. & JURISPRUDENCE 217, 229–30 (1993).

title,<sup>42</sup> and inalienability during that time,<sup>43</sup> are examples of how "more" formal choice does not necessarily produce more freedom. These requirements are the primary example of why concerns over capability to develop will and the effects of inequality of bargaining power justify redistribution of power through property rules in addition to transfer payments in a redistributive scheme.

In economic terms, outright grants of 160 acres to qualified persons give these persons "more" than restricted grants. Because unrestricted grants include the possibility of both settlement and sale, they give the recipient greater choice in how to use the public bounty. Use restrictions and alienation restrictions give "less," in that they force a recipient to settle the land. National Reformers argued for these restrictions by relying on the experience of the military bounty acts.<sup>44</sup> These acts granted veterans freely alienable warrants to land, but failed to get farms to soldiers. Instead, they became the vehicle of land accumulation, leaving veterans with pittance to show for their pains.<sup>45</sup>

A relational model predicts that outright grants made under conditions similar to the military bounty acts would result in deals unfavorable to the grantee. Reformers perceived veterans and settlers to be needy.<sup>46</sup> Their neediness, combined with the cost and uncertainty of starting a farm, would make the staying power of grantees low. Given the lack of staying power of the grantees and the withholding capacity of speculators over money, needy grantees would be forced to transact. The distributive outcome of these transactions would reflect the respective bargaining power of the parties: speculators would accumulate land and grantees would receive low returns.<sup>47</sup>

<sup>42</sup> The Reformers originally advocated permanent requirements of use for agriculture, or, in towns, for small manufacture. See *Proposed Bill for Congress*, *supra* note 28, §§ 2, 5, at 313-14; *Proposed Bill for the States*, *supra* note 40, §§ 1, 3, at 316; GREELEY, *supra* note 34, at 317; WORKING MAN'S ADVOC., Apr. 6, 1844, *reprinted in* 7 DOCUMENTARY HISTORY, *supra* note 26, at 312.

<sup>43</sup> All homestead bills and the Act itself required a period of residence and cultivation and prohibited alienation of any portion of the tract during that period. Some bills restrained alienation for a period beyond the grant of patent. See H.R. 294, 29th Cong., 1st Sess. (1846); H.R. 329, 29th Cong., 1st Sess. § 4 (1846); H.R. 34, 31st Cong., 1st Sess. § 3 (1850). Other bills restrained alienation only during the period of required settlement. See H.R. 319, 29th Cong., 1st Sess. § 2 (1846); H.R. 7, 32d Cong., 1st Sess. § 2 (1852); H.R. 24, 36th Cong. 1st Sess. § 2 (1860). Commutation further narrowed the restraint. See *infra* note 48.

<sup>44</sup> See, e.g. N.Y. WEEKLY TRIB., Mar. 21, 1846, at 3, *reprinted in* 8 DOCUMENTARY HISTORY, *supra* note 26, at 64, 64-65. ("All this ground has been gone over once in the case of the Military Bounty Lands which cost the soldiers an ample consideration in fatigue, privation and blood, and were in good part sold by them for a twentieth part of their value.")

<sup>45</sup> See GATES, *supra* note 22, at 261-62, 263-64, 272-73; Le Duc, *supra* note 22, at 17-18.

<sup>46</sup> See, e.g., N.Y. WEEKLY REV., Mar. 21, 1846, at 3, *reprinted in* 8 DOCUMENTARY HISTORY, *supra* note 26, at 65 ("Nearly all the Landless are needy; many of them are improvident; not a few are dissipated.")

<sup>47</sup> The New York *Weekly Tribune* attacked the first homestead bills, H.R. 294 and H.R. 319, 29th Cong., 1st Sess. (1846), on precisely these grounds:

Use and alienation restrictions could effect a staying power in the settlers by forcing them to wait until they had cultivated the land for five years. At that point, farming would have provided the settlers with a staying power bred of subsistence self-sufficiency. Furthermore, a bounty grantee's will to become a farmer was less clearly formed before she had experienced farming than after a period of habituation through actually living on the land. The five-year use requirement would afford settlers the opportunity to be transformed by the life experience of farming. They could develop a firmer will to farm than they would have had had they been allowed to transact before they had learned to value farming through living it. Short-term use and alienation restrictions would expand the long-term capability set of potential homesteaders both by affecting their capability to develop a will to become farmers and by maintaining a real possibility of farming, relatively free from coercion by large landholders.<sup>48</sup>

## VI. CONCLUSION

Law structures human relations by identifying the participants in some relationships; by directly prescribing what the participants in

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Messrs. McConnell of Ala. and Johnson of Tenn. evidently suppose they are acting in accordance with the purpose of the National Reformers in proposing to make a gift of 160 acres of Public Lands in fee simple to every landless citizen who will claim it. But they could not be more utterly mistaken. The Reformers demand that all monopoly of and speculation in the Lands yet Public shall be stopped . . . . To offer each a quarter section of Public Land as a free gift with liberty to sell the fee simple to any one, would be simply enabling the speculator to obtain second-hand for a few dollars what now costs him hundreds.

N.Y. WEEKLY TRIB., Mar. 21, 1846, at 3, *reprinted in* 8 DOCUMENTARY HISTORY, *supra* note 26, at 64, 64-65.

<sup>48</sup> This relational model can explain the subversive role of the commutation provision of the Homestead Act. Commutation was introduced by Andrew Johnson in S. 416, 36th Cong., 1st Sess. § 10 (1860), which was a compromise bill intended to allow Southern Democrats to vote for homesteading. See JAMES T. DUBOIS & GERTRUDE S. MATHEWS, GALUSHA A. GROW, FATHER OF THE HOMESTEAD LAW 200 (1917). Commutation was retained in Section 8 of the Act, even though the rest of the Act was based on Galusha Grow's House bill, H.R. 24, 36th Cong., 1st Sess. (1860). See ROBBINS, *supra* note 23, at 206. Directly contravening the National Reformers' program, commutation allowed settlers to avoid all use and alienation restraints by paying the minimum price that the land had graduated to and receiving fee simple immediately. The ability to commute meant that the settler was able to transact before she could begin to produce and become self-sufficient, and before she learned whether she liked farming. In the first 18 years of the Act's operation, commutation was rare. See HIBBARD, *supra* note 23, at 386. Between 1881 and 1904, however, almost a quarter of all homestead acreage was commuted. See *id.* In some years, the acreage commuted was over half the acreage entered under the Act. See GATES, *supra* note 22, at 494 (compiling and comparing homesteading entries and commutation). Commutation became a means for discounted land accumulation by increasingly industrialized agricultural holdings and by urban investors who acquired the land for speculation. See HIBBARD, *supra* note 23, at 386-90.

these transactions can do to each other; and, by opening and foreclosing alternatives to transacting. The combination of these three operations affects the positional power that a person occupies in the transactions through which she lives.

One's power position affects one's freedom in two ways. First, a person interacts with others in the production of and resistance to knowledge. Law structures that position by determining who among parents, teachers, ministers, advertising agencies, artists, street gangs, or similar producers of knowledge is allowed to structure the individual's knowledge of the world and how they can do so, and to what extent they can be resisted and how. Knowledge, in turn, determines the individual's capacity to develop will and aspiration, which is the first step toward free choice. Second, an individual interacts with others in her attempt to effectuate her will. A person's power to resist the plans of others when they encroach on her own and to make space for her own plan, is as important to the individual's ability to effectuate her life plan as is the capacity to develop a plan in the first place. Because freedom is bound up with the power one wields in the contexts through which one lives, freedom is not a categorical state of being that can be determined by looking at a sole subject. Like wealth, freedom is positional.

The positional nature of freedom suggests that social reform ought to include components that reconstitute the power of participants in society vis-à-vis each other, as well as components that enhance immediate material well-being. As in the case of National Reform, reconstituting power may require rejection of rules that ensure formal choice for all, when these rules will effectively curtail the choice actually available to the weaker members of society. The claim is not, however, that reconfiguration of property rights is always better than general transfer payments. It is not even that reconfiguring property rights is always a necessary component of a redistributive scheme. Rather, the argument is that a social reform program must fit the transactional contexts through which it will be implemented. Planners of social reform must be sensitive to the relative power of the participants in these expected transactions, and must consider how the program they propose would be affected by the legal rules governing the transactions. If these rules tend to limit the efficacy of the reform program, reformers should consider reconfiguring them.

The relational approach expressed in this Note justifies such reconfiguration of basic rules by articulating the relationship between the power one wields through the economic position one occupies and the freedom one has effectively to develop and pursue a life plan. Rules regulating economic relations must ensure that people are not powerless effectively to constitute their lives in this society of human beings that are at once separate and in union.