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Frontier Feudalism: Agrarian Populism Meets Future Interest Arcana in the Land of Manifest Destiny

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COMMENT

Frontier Feudalism: Agrarian Populism Meets Future Interest Arcana in the Land of Manifest Destiny

The Cole Porter classic, "Don't Fence Me In," asks the heavens (or maybe the state) for unrestricted "land, lots of land under starry skies above."[1] A full-throated acclamation of "frontier living," Porter's tune also evokes the boundless potential of achievement and ownership so ensconced in American mythology. Echoing since the clamor of "Manifest Destiny,"[2] the urge to expand remains a persistent national theme. It also finds actualization at the state level; indeed, Oklahoma exemplifies such an urge, its archetypal "Boomers and Sooners"[3] the human embodiments of an unquenchable desire to set one's stake in the land.

But such quixotic imagery must find its realization in the framework of the law—the law of property, to be specific. Hardly a rugged, rough-hewn creation of the commoner, America's property law remains a distillation of feudal English concepts and doctrines.[4] And the scheme is hardly stable. While it persists, in part or in whole, across the United States, it has weathered virtually unflagging broadsides for decades.[5] The effects are

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1. Bing Crosby & the Andrews Sisters, *Don't Fence Me In*, *on* BING CROSBY, THE DEFINITIVE COLLECTION (Geffen Records 2006). Cole Porter wrote the song in 1934, and the song was made famous by Bing Crosby and the Andrew Sisters ten years later. *See Don't Fence Me In*, TCM (Feb. 15, 2017), http://www.tcm.com/this-month/article/161339%7C0/Don-t-Fence-Me-In.html. The opening stanza is:

> *Oh, give me land, lots of land under starry skies above*
> *Don't fence me in!*
> *Let me ride through the wide-open country that I love*
> *Don't fence me in!*
> *Let me be by myself in the evening breeze,*
> *And listen to the murmur of the cottonwood trees;*
> *Send me off forever, but I ask you please*
> *Don't fence me in!*

2. *See* SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 562, 562 n.38 (2005) (noting that Manifest Destiny was viewed as "essentially democratic—not simply in the old Jeffersonian tradition of enlarging the empire of liberty, but in a supercharged moral sense, stressing America's duties to spread democratic values and institutions").

3. *See* W. DAVID BAIRD & DANNEY GOBLE, OKLAHOMA: A HISTORY 141–48 (2008).

4. *See* ROBERT LAURENCE ET AL., A STUDENT'S GUIDE TO ESTATES IN LAND AND FUTURE INTERESTS vii (LexisNexis, 3d ed. 2012).

5. For just a sampling of such criticism, see 3 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 27.1 cmt. a (AM. LAW INST. 2011) (overhauling the

mixed: while regular criticism may keep law in tune with prevalent societal policy, property law increasingly looks like something mangled by a flailing cleaver rather than an even-handed scalpel.[6] Classifications and rules are stricken wholesale, with little analysis or discussion beyond a rote recitation of shibboleths like "grantor's intent," "simplicity," "efficiency," and "alienation."[7] When filtered through plodding legislative reform, these policy proposals may end up translated into an incoherent patchwork of medieval detritus, hardly the goal of comprehensive model laws and treatises.[8]

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common-law Rule Against Perpetuities and replacing it with a "wait-and-see" approach that applies equally to contingent and vested remainders); 1 JOHN. A. BORRON, JR., SIMES AND SMITH: THE LAW OF FUTURE INTERESTS (3d ed. 2002) (detailing the demise, induced by courts or legislatures, of future interests doctrines like the Rule in Shelley's Case, the Doctrine of Worthier Title, and the doctrine of the destructibility of contingent remainders); D. Benjamin Barros, *Toward a Model Law of Estates and Future Interests,* 66 WASH. & LEE L. REV. 3 (2009) (proposing a model property law that eliminates feudal future interest doctrines and streamlines future and present interests); J.J. Dukeminier, Jr., *Contingent Remainders and Executory Interests: A Requiem for the Distinction*, 43 MINN. L. REV. 13 (1958) (calling for the elimination of allegedly illusory distinctions between contingent remainders and executory interests); T. P. Gallanis, *The Future of Future Interests*, 60 WASH. & LEE L. REV. 513 (2003) (offering policy recommendations that radically simplify the Anglo-American future interest regime); Lawrence W. Waggoner, *Reformulating the Structure of Estates: A Proposal for Legislative Action*, 85 HARV. L. REV. 729, 729–35 (1972) (naming deficiencies of the common-law property system and proposing reforms in the pursuit of greater simplicity and clarity).

6. *Compare* RESTATEMENT (FIRST) OF PROP. (AM. LAW. INST. 1940) (detailing feudal-era future interest classifications and doctrines, while offering assessments of where American statutes stood vis-à-vis these topics), *with* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS (AM. LAW INST. 2011) (offering wholesale reforms of future interest doctrines and vast changes to classificatory schemes, despite the failure of states to recognize some or all of these proposed reforms).

7. *See, e.g.*, 3 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 25.5 ("The Rule of Destructibility of Contingent Remainders is not recognized as part of American law."); *see also* Katheleen Guzman, *Response: Worthier for Whom?*, 68 OKLA. L. REV. 779 (2016) (noting frustration with the Restatement (Third)'s terse dismissal of future interest doctrines like the Doctrine of Worthier Title).

8. For instance, some jurisdictions may retain one future interest doctrine such as the Rule in Shelley's Case, while abrogating another, such as the Doctrine of Worthier Title. Oklahoma, for example, has abrogated the Rule in Shelley's Case by statute, 60 OKLA. STAT. § 41 (2011), while the fate of the Doctrine of Worthier Title is less clear. *See* Guzman, *supra* note 7, at 801 (noting that the doctrine has been applied in numerous Oklahoma cases). Compare this situation with, for instance, Barros's comprehensive model law for present estates and future interests. *See* Barros, *supra* note 5, at 67–72.

This Comment aims to reevaluate facets of our property law, with a particular focus on future interests and the feudal-era doctrines that operate alongside them. Two major points frame the discussion. First, this Comment focuses on the law of Oklahoma, both in the spirit of the adage, "land law is local,"[9] and in light of the state's unique land history. Oklahoma is fertile ground for a reevaluation of feudal-era concepts, offering a burst of fresh air for seemingly stagnant and stale ideas.[10]

Second, the arguments below are as much procedural as they are substantive. That is, the following conclusions, while important, are not offered as definitive; rather, the goal is to challenge legal scholarship's hasty (and at times stubborn) abandonment of legal rules that have endured for generations.[11] Perhaps forces like the *Restatement (Third)* will emerge triumphant in the battle of ideas, but the battle ought to be fought regardless.

Part I of this Comment briefly examines Oklahoma's future interest law in light of the broad criticisms leveled against the Anglo-American system, with a close examination of the doctrine of the destructibility of contingent remainders (hereinafter, "the destructibility doctrine").[12] Part II—the bulk of this Comment—delves deeply into recent scholarship and recommended property reforms. While interesting suggestions arise, the reforms overall divest the grantor of control of her property—ironic, given that the purpose

9. 1 HERBERT THORNDIKE TIFFANY, THE LAW OF REAL PROPERTY § 1 (3d ed.), Westlaw (database updated Sept. 2016) ("Land, having a fixed location, is controlled in all respects . . . by the law of the place where it is located.").

10. Perhaps *new* wineskins for *old* wine (or something like that), to flip the old parable on its head.

11. *See* Guzman, *supra* note 7, at 780, 801 (agreeing with the contention that suggestions made by authorities such as the Restatement should never be blindly accepted).

12. By way of prologue, this Comment concentrates heavily on the destructibility doctrine for a reason. Much of modern property law and debate centers around the primacy of the grantor's intent—deeds should be construed in accordance with such intent, even where that intent might seem incongruous with prevailing social policy. *See* 2 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 cmt. m (AM. LAW INST. 2011) ("If, on the basis of the evidence, the donor's intention is found to prefer a result that is inconsistent with public policy, the donor's intention controls the meaning, though not necessarily the effect, of the donative document."). Here, this Comment argues that abrogating the destructibility doctrine, often in the name of grantor's intent, actually does a disservice to that intent by divesting the grantor of power over her land, such as the power to alienate it in accord with her wishes. *See infra* Part II. Hence, while the observations in this Comment are salient for other future interests doctrines and classificatory areas of common-law property, much of the argument is couched in an analysis of the destructibility doctrine and critiques of scholars who call for its abrogation.

of the reforms is more often than not to promote alienability and effectuate the grantor's intent. Part III returns to Oklahoma—this time an historical Oklahoma of the 1880s–1910s—looking for political and ideological undercurrents from which to cull new policy rationales that might salvage feudal-era property concepts now under siege. When conceptualized through a non-feudal lens, these time-tested property concepts may indeed strengthen grantor rights and promote alienability. That is, even if alienability and grantor's intent are significant—and correct—policies contextualizing and inspiring American property law, efforts at efficiency, simplification, and radical reform may not actually advance these underlying policy goals;[13] instead, reframing old ideas, rather than abrogating them, may better effectuate these policies. Oklahoma, with its unique land history and sociopolitical viewpoints, offers an alternative to hastily discarding pillars of property law that have persisted for centuries. While medieval England may no longer justify some of these principles, America's heartland just may.[14]

I. What's Up with Future Interest Doctrine in Oklahoma?

The Anglo-American system of property law, largely derived from feudal-era England, has weathered sustained criticism for decades.[15] Scholars have aimed at one area in particular—future interest classifications and doctrines.[16] An outgrowth of the "bundle of sticks" idea at the heart of property law,[17] temporal division of property is a fundamental facet of the Anglo-American understanding of property.[18] But with the benefits of multigenerational property arrangements come broader concerns tied to concepts of land alienability and marketability, the importance of the

13. *See* Guzman, *supra* note 7, at 795 ("[I]n the centuries since assorted earlier vesting (thus transfer-supporting) future interest rules have arisen, Anglo-American jurisprudence has demonstrated but slight concern for their furtherance, especially when to do so would arguably contravene grantor's intent. In other words, efficiency is not enough.").

14. To be sure, in many ways this Comment *accepts* the importance of alienability and effectuating the grantor's intent as two major policies undergirding property law. The suggestion, however, is that abrogation often fails to achieve the goal of strengthening these twin justifications.

15. *See supra* note 5.

16. *Id.*

17. *See* JOHN E. CRIBBET ET AL., PROPERTY: CASES AND MATERIALS 2–3 (9th ed. 2008); *see also* LAURENCE ET AL., *supra* note 4, at 2.

18. Gallanis, *supra* note 5, at 514–15 (noting that "temporal division of ownership . . . is at the heart of modern property transactions").

grantor's intent, and the critical balance between the "reign of the dead hand" and the authority of the original landowner.[19]

In particular, scholars have repeatedly questioned the classificatory scheme for future interests,[20] along with four specific doctrines that police these interests: the Rule Against Perpetuities,[21] the Doctrine of Worthier Title,[22] the Rule in Shelley's Case,[23] and the destructibility doctrine.[24] Frequently, "grantor's intent" and "alienability of land" appear as the major animating forces behind these attacks, with "efficiency" and "simplicity" often tagging along.[25]

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19. These themes—alienability and grantor's intent—appear frequently in discussions of property law and policy. Sometimes they antagonize each other, while at other times they exist in harmony. *See, e.g.,* 2 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFER §11.3 cmt. m (AM. LAW INST. 2011) (noting the primacy of donative intent while also acknowledging that, in cases of ambiguity, the donor is presumed to have favored public policy's preference for land alienability); BORRON, JR., *supra* note 5, § 193 (noting that the doctrine of the destructibility of contingent remainders "obviously defeats the intent of the grantor" and may only be justified because it increases land alienability, albeit haphazardly).

20. *See* Barros, *supra* note 5; Dukeminier, *supra* note 5; Waggoner, *supra* note 5.

21. The classic formulation of the rule is as follows: "No interest is good unless it must vest, if at all, no later than twenty-one years after some life in being at the creation of the interest." JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201 (Roland Gray ed., 4th ed. 1942).

22. The Doctrine of Worthier Title, put simply, is the law against remainders in the heirs of a grantor. BORRON, JR., *supra* note 5, § 1601.

23. The Rule in Shelley's Case is the inverse of the Doctrine of Worthier Title, acting to prevent remainders in a grantee's heirs. *Id.* § 1541.

24. "A contingent remainder is destroyed unless it vests at or before the expiration of the preceding estate." LAURENCE ET AL., *supra* note 4, at 43. The rule derives from the feudal concept of "seisin," a hazy concept typically described as reified possession. *See* 1 TIFFANY, *supra* note 9, §§ 20, 22, 326. Feudal law demanded that the seisin not be in abeyance—effectively, that the land not be unoccupied. *Id.* § 326. If the livery of seisin (the physical actualization of seisin) could not be transferred to the remainderman upon the expiration of the supporting present estate—because, for example, the remainderman had yet to satisfy the contingency of his remainder—the estate would return to the original grantor, who held a reversion. *Id.* This situation also stemmed from the fact that contingent remainders, at common law, were viewed as "mere possibilities of estates, less concrete than present estates or even vested remainders." *See id.* The doctrine has come under fire for its roots in these feudal concepts. *See, e.g.*, Abo Petroleum Corp. v. Amstutz, 600 P.2d 278, 280–81 (N.M. 1979) (noting that the doctrine "has been renounced by virtually all jurisdictions in the United States" and that it often frustrates grantor's intent in the name of historical justifications).

25. *See* Barros, *supra* note 5; Gallanis, *supra* note 5; Waggoner, *supra* note 5.

The *Restatement (Third)* offers a telling representation of where reform efforts presently stand. The *Restatement (Third)* jettisons the finer distinctions between future interests, instead offering two discrete categories: vested and contingent remainders.[26] It exchanges the common-law Rule Against Perpetuities for a "wait-and-see" approach, voiding interests that fail to vest or terminate in a specific timeframe.[27] And it wholly abrogates all of the feudal future interest doctrines listed above, insinuating that they have no place in American law.[28] More broadly, the *Restatement (Third)* also declares the preeminence of grantor's intent, coupled with a societal preference for alienability.[29] Together, these twin policy pillars hem in deed construction, such that the grantor's will tends to prevail—and where the grantor's will is vague, he or she is presumed to have favored maximum alienability of the land.[30]

State laws, such as those of Oklahoma, fit within this prescriptive framework. In some ways, Oklahoma occupies a middle ground between holding fast to the old common law and allowing itself to be swept up in reformist fervor. Examples of this ideological middle ground can be found throughout both its statutes and common law. First, Oklahoma has statutorily abrogated the Rule in Shelley's Case, following both the trend among states and the recommendation of the *Restatement (Third)*.[31] Second, while Oklahoma has enacted statutory reform to the Rule Against Perpetuities for trusts,[32] the classic Rule itself remains largely intact—likely due in no small part to its constitutional enshrinement.[33] In the common-law realm, a more nuanced scheme of future interests still operates, recognizing executory interests as well as various contingent and vested remainders.[34]

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26. *See* 3 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 25.1–25.3 (AM. LAW INST. 2011).

27. *See id.* §§ 27.1–27.3. This contrasts with the traditional Rule Against Perpetuities, where particular future interests are void ab initio. *See* LAURENCE ET AL., *supra* note 4, at 99–107.

28. *See* 2 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 16.2–16.3, 25.5 (AM. LAW INST. 2011).

29. *See id.* §§ 11.2–11.3.

30. *Id.*

31. 60 OKLA. STAT. § 41 (2011); *see also* 2 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 16.2 (noting that the clear majority of states have abolished the Rule in Shelley's Case).

32. *See* 60 OKLA. STAT. § 175.47(C) (Supp. 2015).

33. OKLA. CONST. art. II, § 32 ("Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State.").

34. *See, e.g.*, 60 OKLA. STAT. §§ 29–30, 35 (2011).

But here is where matters get murkier. For instance, the fate of the Doctrine of Worthier Title is not altogether clear.[35] More uncertain still is the fate of the destructibility doctrine. While two cases are often cited[36] for the proposition that Oklahoma has abrogated the destructibility doctrine—*Whitten v. Whitten*[37] and *Beatty v. Miley*[38]—these cases represent at most a weak repudiation of a doctrine operating in the wings of state law. Moreover, they demonstrate that failing to recognize the rule does not always further the legal academy's purported goals of increasing alienability and, more significantly, honoring the grantor's intent.

Whitten is typically cited as the first case purportedly abrogating the destructibility doctrine.[39] In *Whitten*, the grantor, Julia A. Morris, granted life estates to her son and daughter—Calvin Lee Clifford Morris and Francis Elizabeth Whitten—by two separate warranty deeds executed in 1934.[40] The life estates were followed by a remainder in the heirs of the body of each grantee.[41] In 1948, Ms. Morris executed two quitclaim deeds purporting to transfer her reversion in each parcel to her children, such that they would now hold an estate in fee simple absolute rather than merely a life estate.[42] The conveyances, then, look like this:

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35. *See* Guzman, *supra* note 7, at 801 (suggesting that while Oklahoma has applied the Doctrine in case law, it has not had an adequate opportunity to determine whether the Doctrine truly persists in Oklahoma); *see also* Beamer v. Ashby, 1951 OK 111, ¶ 8, 231 P.3d 668, 669 ("[The court] ha[s] not had occasion to adopt or reject the 'worthier title' doctrine, and it is not necessary to do so in this case.").

36. *See* BORRON, JR., *supra* note 5, § 209 n.7 (citing *Whitten v. Whitten* and *Beatty v. Miley* for the proposition that Oklahoma has eliminated the destructibility doctrine).

37. 1950 OK 93, 219 P.2d 228.

38 . 1951 OK 184, 233 P.2d 269.

39. *See* BORRON, JR., *supra* note 5, § 209 n.7.

40. *Whitten*, ¶ 2, 219 P.2d at 230.

41. *Id.* The Rule in Shelley's Case had been abrogated by statute at this point. *See* 60 OKLA. STAT. § 41 (2011) ("When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life.").

42. *Whitten*, ¶ 3, 219 P.2d at 230. It is somewhat unclear from the case opinion whether Ms. Morris meant to give her reversions in all parcels solely to her daughter. The opinion quotes language from each quitclaim deed—but the language pertains only to Ms. Morris conveying over her reversion to Francis Whitten, not Calvin Morris. More likely, the court simply quoted one of the quitclaim deeds to illustrate the conveyance, implying that the other quitclaim deed included the same language, but to Calvin Morris.

1934: *O*→*A* for life, remainder in *A*'s heirs of the body[43]

1948: *O*→*A* and her heirs

Under the destructibility doctrine, the second deeds would have given Ms. Morris's children a fee simple absolute by way of merger.[44] That is, each child held a life estate prior to the 1948 deeds, which conveyed Ms. Morris's reversion to the children. Thus, the life estate and reversion would merge, destroying the contingent remainder in each child's bodily heirs and resulting in each child holding a fee simple absolute.

The Oklahoma Supreme Court, however, chose a different route. While the Court rejected the argument that the remainders were vested in the children of Elizabeth Whitten and Calvin Morris—given that an individual's "heirs" cannot be ascertained until his or her death,[45] the remainders were contingent—it held that Ms. Morris's reversion, rather than the remainders, was the subordinate future interest in the conveyances.[46]

Whitten represents Oklahoma's first crack in the common-law destructibility doctrine. Under the common-law rule, all contingent

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43. In the event that no bodily heir of *A* exists, the property would revert back to *O*. Thus, *O* holds a reversion.

44. *See* BORRON, JR., *supra* note 5, § 197.

45. *Whitten*, ¶¶ 11–13, 219 P.2d at 231–32.

46. Specifically, the Oklahoma Supreme Court reasoned:

> [I]t does not follow . . . that because the fee title, except to the extent of the life estate, remained vested in the grantor that the latter's deed to the life tenant conveyed an indefeasible fee, thus defeating the contingent remainder. *Since the effect of the [1934] conveyance was to create a contingent remainder in the entire fee, the only alienable or assignable estate remaining in the grantor was that of reversion which was subordinate to the contingent remainder because its enjoyment is dependent upon the failure of the event upon the occurrence of which the remainder was to vest*. . . . Under the circumstances, the deeds of March 9, 1948, were ineffective to disturb the existence of the remainders theretofore created and therefore could not enlarge into a fee the life estates then enjoyed by the grantees. The only effect of such deeds was to carry to the grantees the reversion theretofore vested in the grantor.

Id. ¶¶ 14–15, 219 P.2d at 232 (emphasis added). For support, the Court cites language from a Virginia case:

> "Upon a grant or devise of a particular estate limited to determine upon the happening of an event which is certain to happen, with a contingent remainder over, there remains in the grantor or devisor a *reversion, subject to be defeated by the happening of the contingency upon which the remainder is conditioned*."

Id. ¶ 14, 219 P.2d at 232 (quoting Copenhaver v. Pendleton, 155 S.E. 802, 813 (Va. 1930) (emphasis added)).

remainders require the support of a freehold estate.[47] Once this freehold estate terminates (whether by natural expiration or by merger with another interest), the unvested remainder, suddenly exposed and unsupported, is destroyed.[48] In *Whitten*, however, the dynamic flipped. Whereas at common law, the remainder in the children's heirs would have been destroyed by the 1948 quitclaim deeds, in this case the children ended up with a life estate and the reversion, prevented from merging *by* the contingent remainder in their bodily heirs.

A year later, the Oklahoma Supreme Court decided *Beatty v. Miley*.[49] In *Beatty*, Lillee Pearl Watt conveyed land by warranty deed to her husband, William M. Watt, in 1925.[50] The deed specified that William would hold the land for so long as he and Lillee were married; upon the end of their marriage, by death or otherwise, the land would go to either Lillee's children or their children, should they be deceased. In 1930, William conveyed the land back to Lillee by warranty deed.[51] William died in 1932, and Lillee's three children brought a quiet title action thereafter.[52] The Oklahoma Supreme Court held that *Whitten* controlled, and thus William's conveyance of his present interest back to Lillee did not give her a fee simple absolute.[53] The children's remainder (called "contingent" by the court) blocked the merger of the present interests.[54]

But *Beatty*'s pertinence to the destructibility doctrine is suspect from the outset. In *Beatty*, the primary conveyance could be written as follows:

> *O*→*A* for so long as he and *O* remain married, and when *O* and *A* are no longer married, to *O*'s children.[55]

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47. *See* BORRON, JR., *supra* note 5, § 193; Douglass L. Mann, Recent Decision, *Future Interests—Contingent Remainders—Destructibility by Merger*, 49 MICH. L. REV. 762 (1951).

48. *See* BORRON, JR., *supra* note 5, § 193.

49. Beatty v. Miley, 1951 OK 184, 233 P.2d 269.

50. *Id.* ¶ 15, 233 P.2d at 272.

51. *Id.*

52. *Id.* ¶ 16, 233 P.2d at 273.

53. *Id.* ¶¶ 19, 233 P.2d at 273–74.

54. *Id.* ¶ 23, 233 P.2d at 273.

55. The pertinent language of the conveyance is as follows:

> I, Lillee Pearl Watt . . . do hereby grant, bargain, sell and convey unto William M. Watt, my husband [land] . . . to hold said land during the time that the relation of husband and wife exists between the Parties hereto and when such relationship ceases because of death of either party or from other causes, this property shall go in equal parts to children of [Ms. Watt], provided if any of [her] children should die leaving children of their own, such children would take the interest of [the] deceased child.

At the time of the conveyance, Ms. Watt had three living children—ascertainable individuals.[56] Given that the children's right of possession was not conditioned on an uncertain event, they likely held vested remainders subject to open (or subject to partial defeasance).[57] The court, however, held that the remainders were contingent, applying *Whitten* to conclude that the latter conveyance (from Mr. Watt to Ms. Watt) did not result in merger.[58] Of course, had the remainders been vested in the living children, Ms. Watt would have had no reversion with which Mr. Watt's interest could merge. Regardless of what interest Mr. Watt held,[59] the remainder interest here was not contingent, and thus the case does not speak to the destructibility doctrine.

This leaves *Whitten*. First, it must be noted that *Whitten*'s result runs contrary to the stated policy behind abrogation of the destructibility doctrine. While the rule "tends to increase the alienability of land," critics attack the rule based on its perceived frustration of the grantor's intent.[60]

Id. ¶ 15, 233 P.2d at 272.

56. *Id.* ¶ 16, 233 P.2d at 273; *see also* Jacob F. May, Jr., Note, *Future Interests: Vesting: Supplanting Limitations: Adverse Possession*, 6 OKLA. L. REV. 103 (1953).

57. A vested remainder subject to open is a remainder in a class where one of the class members is born and ascertainable, and there is either no condition precedent or the class member has satisfied the condition. *See* BORRON, JR., *supra* note 5, § 114; *see also* May, *supra* note 56, at 104 ("The test of vesting in interest is not whether the prior particular estate upon which the remainder is dependent is subject to termination upon a contingency, but rather, whether or not, throughout its continuance, the remainderman and his heirs 'have the right to the immediate possession, whenever and however the preceding freehold estates may determine.'" (quoting LEWIS M. SIMES, CASES ON FUTURE INTERESTS 30 (2d ed. 1951)).

58. *Beatty*, ¶¶ 19, 23, 233 P.2d at 273–74.

59. It is somewhat unclear from the language of the conveyance what Mr. Watt held. He was given a present, possessory estate that he could hold until his marriage with Ms. Watt ended. This estate was not potentially infinite in duration, since he was only able to hold it for the length of the marriage—which was, at maximum, the length of his life or that of Ms. Watt. But the estate could also end prior to Mr. Watt's death—were he and Ms. Watt to divorce, he would no longer have the right to possess. Mr. Watt, then, had a life estate, which was subject to defeasance (either a life estate determinable or a life estate subject to a condition subsequent). Regardless, the children held a vested remainder, as three were ascertainable at the time the deed was executed.

60. Mann, *supra* note 47, at 764. Mann also references an oft-quoted passage by Justice Holmes to explain why the destructibility doctrine ought to be done away with:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the reign of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past.

Yet it is the grantor's intent that is being frustrated here by *failure* to apply the rule.[61] Ms. Morris likely intended to give her two living children estates in fee simple absolute by merger through her second transfer of her reversion. Instead, the court prevented these interests from merging by virtue of the contingent remainder in the bodily heirs of each child. Under *Whitten*, the contingent remainder is given preference above all other property interests, as well as above the grantor's intent. If the intent of the grantor is to be preferred above all else,[62] it would seem that the ephemeral interests of persons unascertained (perhaps not even in existence yet) should give way to the actions of the original grantor.[63]

Moreover, *Whitten* does not directly speak to the following scenario:

O→*A* for life, then, if *B* is a lawyer, to *B*.

(At the time of *A*'s death, *B* is not a lawyer)

From the conveyance, *A* would hold a life estate, *B* a contingent remainder, and *O* a reversion. Upon *A*'s death, the question becomes: Who is entitled to present possession of the estate? Under the destructibility doctrine, *B*'s remainder would be destroyed and *O* would receive present possession by function of his reversion because *B* failed to become a lawyer by the time of the life estate's expiration. Without the destructibility doctrine, the result is more ambiguous. One option would be to give *O* present possession *subject to defeasance*; thus, *O* would receive a fee simple subject to executory limitation, and *B* would hold a springing executory interest.[64] While *O*'s interest would be potentially infinite, *B* could terminate it at his leisure: simply become a lawyer, and the land is his.

Id. (citing Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)); *see also* Abo Petroleum Corp. v. Amstutz, 600 P.2d 278, 281 (N.M. 1979) (quoting the same passage).

61. Mann, *supra* note 47, at 764.

62. 1 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2011) ("The controlling consideration in determining the meaning of a donative document is the donor's intention.").

63. *See* LAURENCE ET AL., *supra* note 4, at 32 ("A contingent remainder was not considered a very substantial interest at common law. Hence, a contingent remainder was not alienable inter vivos . . . .").

64. *See id.* at 156–57 (examining statutory reforms to the destructibility doctrine and concluding that, post-destructibility, deeds will result in the former remainderman holding an executory interest, with the grantor possessing a defeasible fee after the expiration of the life estate); *see also* Guzman, *supra* note 7, at 797.

Interestingly enough, *Whitten* may not support this result. In *Whitten*, the reversion was "subordinate to the contingent remainder because its enjoyment is dependent upon *the failure of the event upon the occurrence of which the remainder was to vest*."[65] In other words, Ms. Morris's reversion could ripen into a present, possessory estate if the event conditioning the remainder, bodily heirs, "failed"—implying the death of the children—such that the remainder did not vest. This "wait-and-see" approach is arguably appropriate in this context. The destructibility rule holds that a contingent remainder must vest at or before the expiration of its preceding estate.[66] If the termination of the preceding estate is understood as the death of the life tenant, rather than the merger of the life estate with a reversion, then *Whitten*'s result evades rather than abrogates the destructibility doctrine.

Granted, this is a stretch: merger at common law is one way to terminate a life estate, such that a contingent remainder would be destroyed by this termination if it had failed to vest in time.[67] And reading this decision narrowly requires setting aside the idea that merger would represent the "expiration" of the preceding estate.[68] But under this reading, *Whitten* would not be a wholesale rejection of destructibility. In fact, *Whitten* would simply stand for the idea that the original deed, overall, is given preference: the contingent remainder was created with a preceding life estate, and assessing whether the remainder vests waits until this life estate "dies off," subsequent transfers notwithstanding. Regardless, the state of the destructibility doctrine in Oklahoma is ambiguous at best, and absent explicit statutory abolition, it stands to reason that the doctrine could remain alive and active—or at least ripe for a renaissance.

Broadly speaking, then, Oklahoma's future interest law might be characterized as intermediate or moderate—situated somewhere between the *Restatement (Third)*'s radical reforms and the traditional common law of feudal England. Specific areas of the law appear unsettled or vague, calling for renewed discussion of the policies that best embody Oklahoma's underlying sociopolitical values. Part III will discuss these values, along with the notion that common-law doctrines, when conceptualized in a non-feudal light, may both speak to Oklahoma's land heritage *and* effectuate the policies of alienability and grantor's intent framing modern reform efforts.

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65. Whitten v. Whitten, 1950 OK 93, ¶ 14, 219 P.2d 228, 232 (emphasis added).

66. *See* BORRON, JR., *supra* note 5, § 192.

67. *See id.* § 197.

68. Perhaps we could conceptually differentiate the "termination" of a preceding estate—say, through merger and forfeiture—with the "expiration" of the preceding estate—the natural, foreordained death of the life tenant.

But the strength of these efforts must be tested and examined. That is, what are the primary effects of contemporary policy proposals on common-law notions of real property and the owner's relationship to it—and do they accomplish that which they set out to achieve? Part II attempts to ask and answer these important questions.

II. Modern Property Law—Recommendations and Problematics

Modern property law recommendations have focused on stripping away the so-called relics of feudalism in favor of a simplified, straightforward approach to estates and future interests. Here this Comment examines two proposals: Professor Gallanis's Uniform Future Interests Act[69] and Professor Barros's model law of estates and future interests.[70] Both share substantial similarities, aiming to pare down the current array of present and future interests into a smaller galaxy of options for grantors. But in the quest for a more transparent, streamlined system, both scholars leave property owners with fewer ways to dispose of their land—and arguably less power over the fee simple absolute central to modern conceptions of ownership.[71]

A. Gallanis

Professor Gallanis proposes five major reforms to simplify the American scheme of future interests.[72] He begins with a familiar refrain, lambasting the "late-medieval baggage" of future interest law that "revels in unhelpful complexity, elevates form over substance, and frustrates the very transactions it should facilitate."[73] In its place, Professor Gallanis offers his Uniform Future Interests Act, which jettisons the cumbersome classifications and substantive arcana of the future interest regime while preserving the "temporal division of ownership that is at the heart of modern property transactions."[74]

His first reform allows full alienability of future interests, regardless of classification.[75] At common law, only vested interests could be alienated

69. *See* Gallanis, *supra* note 5.

70. *See* Barros, *supra* note 5.

71. *See* LAURENCE ET AL., *supra* note 4, at 8 ("Today, because modern caselaw and statutes favor the creation of the fee simple absolute, the fee simple absolute is the default estate.").

72. Gallanis, *supra* note 5, at 515.

73. *Id.* at 514.

74. *Id.* at 515.

75. *Id.*

inter vivos,[76] whereas contingent remainders were treated as "mere possibilities" not warranting recognition as actual property interests.[77] This reform follows the modern trend: the majority of states, Oklahoma included, treat contingent remainders as alienable.[78] Alienability aligns with the modern view that contingent remainders, like vested remainders, amount to extant property rights, rather than possibilities.[79] While Professor Gallanis acknowledges the real difference between vested and contingent future interests, he nonetheless contends that this difference is reflected through pricing—the market for contingent remainders may be scant, but interest holders should still be able to alienate, even if only for paltry sums.[80]

The second reform considers the issue of failure in the future interest context.[81] Regarding failure, Professor Gallanis aims at a specific target: the treatment of executory interests following a defeasible fee.[82] Executory interests are subject to the Rule Against Perpetuities; where the Rule voids an executory interest, the result can differ depending on whether the conveyance gave a fee simple determinable or a fee simple subject to a condition subsequent.[83] Take the following:

> Conveyance 1: *O*→*A* for so long as a church is maintained on the premises, and upon a church not being maintained, to *B*.
>
> Conveyance 2: *O*→*A* on condition that a church is maintained on the property; but if a church is not maintained, to *B*.

In both examples, *B* holds an executory interest. The Rule Against Perpetuities would void the interest in both examples. The results, however, differ: whereas in Conveyance 1, *A* is left with a fee simple determinable, in Conveyance 2, *A* is left with a fee simple absolute. Professor Gallanis

76. *See* LAURENCE ET AL., *supra* note 4, at 27–32.

77. Gallanis, *supra* note 5, at 515–16.

78. *Id.*; *see also* 3 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 25.2 (AM. LAW INST. 2011) (holding future interests to be freely alienable). Oklahoma treats contingent remainders as alienable. *See* 60 OKLA. STAT. § 30 (2011).

79. Gallanis, *supra* note 5, at 519–20.

80. *Id.*

81. *Id.* at 520. Professor Gallanis also addresses issues of acceleration, which are beyond the scope of this Comment and, thus, will not be addressed.

82. *Id.* at 521.

83. *Id.*

would treat the conveyances the same: upon the Rule Against Perpetuities voiding *B*'s interest, *A* would hold the property in fee simple absolute.[84]

Gallanis's third reform abolishes three future interest rules: the destructibility doctrine, the Rule in Shelley's Case, and the Doctrine of Worthier Title.[85] Professor Gallanis is conclusory in this section—a common theme across scholarship addressing these rules[86]—calling on those states that have yet to abrogate the rules to do so in the name of modernity and grantor's intent.[87]

The fourth reform substantially changes the Rule Against Perpetuities, creating a "super-alienability" doctrine that voids all future interests unless they terminate within ninety years of their creation.[88] This changes the Rule Against Perpetuities from a filter discriminating against unvested future interests to a broader oversight mechanism, balancing a preference for free alienability and marketability against the so-called reign of the dead hand.[89] Thus, Professor Gallanis provides a legal backstop to prevent conveyances from tying up land.[90]

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84. Professor Gallanis offers several justifications for this reform:

> First, Anglo-American law has long had a strong policy in favor of the vesting of estates. Allowing *A* to retain the property outright avoids the potential divestiture of *A*'s possessory estate. Second, allowing *A* to retain the property outright promotes marketability. Potential buyers will be more likely to purchase the property from *A* because there is no chance of future divestment. Third, the result gives effect to the grantor's probable intention: namely, that a fee simple limited by an executory interest should continue until the executory interest takes effect . . . . Fourth and last, the result accords with the basic rule on failure: future interests that fail are treated as if they had not been created.

Id. at 522–23.

85. *Id.* at 529.

86. *See, e.g.*, 2,3 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 16.2–16.3, 25.5 (AM. LAW INST. 2011) (proffering perfunctory statements that destructibility doctrine, Doctrine of Worthier Title, and Rule in Shelley's Case are not recognized as part of American law).

87. Gallanis, *supra* note 5, at 530–48.

88. *Id.* at 565. Gallanis's proposal adopts a "wait-and-see" approach to future interests: their validity is assessed ninety years after their creation. If they have failed to vest or terminate by that period, they are voided. *See id.*

89. *Id.* at 559–60.

90. *Id.* at 558–59. Pointing to the increasing legal similarity between vested and contingent future interests, Professor Gallanis heralds this reform:

> [A] rule against the remoteness of vesting makes sense only if there is a good reason to distinguish all categories of vested future interests from future interests that are contingent. Yet the distinction between a contingent interest and an interest that is vested subject to defeasance is often purely formal,

The fifth and final reform appears the most radical, yet still flows naturally from Professor Gallanis's preceding recommendations. He proposes eliminating the entire classificatory scheme for future interests, assimilating all future interests—whether in the grantor or grantee—under a unified "future interest" heading.[91] Professor Gallanis offers four justifications, drawn from the preceding work of Professor Waggoner.[92] First, the complexity of the future interest classification scheme alone is reason to jettison it.[93] Second, the system is artificial, often failing to reflect the substance of a conveyance.[94] Third, the system offers unearned benefits to those who can master it, making it a strategic tool.[95] Finally, the scheme values classification above all else, spilling into—and potentially suffocating—broader questions of construction and enacting the grantor's intent.[96] In light of these rationales (and the fact that an increasing number of jurisdictions treat vested and contingent remainders almost identically), Professor Gallanis takes Professor Waggoner's scholarship one step further by recommending a single future interest for all—grantor and grantee, vested and contingent.[97]

B. Barros

Professor Barros proposes a broader reform of property law than Professor Gallanis, focusing on the entire system of present and future interests. But he also proceeds with more caution, aware of the difficulty of introducing radical change into a system that has endured for centuries, in one form or another.[98] Prompted by the *Restatement (Third)*'s "cogent and

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> except in the jurisdictions that treat them differently for purposes of alienability, acceleration, or destructibility. . . . [T]hose differences in treatment are outmoded. Thus, there is little point in a rule separating defeasibly vested interests from contingent ones. . . . [W]e can restrict the dead hand by providing a direct limit on the duration of future interests. Controlling the dead hand does not require us to use the blunt instrument of a rule against the remoteness of vesting.

Id. at 560.

91. *Id.* at 565.

92. *Id.* at 561 (citing Waggoner, *supra* note 5).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 562–63.

98. Barros, *supra* note 5, at 24–28.

elegant simplification of the system of estates and future interests,"[99] Professor Barros declares his mission statement:

> Th[e] complexity [of our system of land ownership] is unnecessary. Many of the distinctions between the types of interests are based on accidents of English legal history that are not relevant to modern law. Five steps . . . could be taken to drastically simplify the system of estates and future interests while having a negligible impact on real-world legal issues.[100]

Much like Professor Gallanis, Professor Barros draws inspiration from American property law's (perceived) needless complexity and antiquated concepts.[101] Primarily, he seeks simplification: according to Barros, property systems should convey information easily and clearly, and the American system currently fails to do so.[102] Moreover, Professor Barros aims to clear out "unnecessary underbrush that has accumulated in law over the past eight hundred years," while retaining the bulk of the current system.[103] Professor Barros makes his recommendations in the form of a model law, suggesting the benefits of uniformity in an area that has historically been marked by heterogeneity across states and locales.[104]

Professor Barros's first two suggestions are relatively uncontroversial.[105] In his third and fourth suggestions, however, Professor Barros calls for one

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99. *Id.* at 5.

100. *Id.* at 18.

101. *Id.* at 21–22.

102. *Id.* at 21.

103. *Id.* at 21–22.

104. Professor Barros expounds on the issue of uniformity in discussing his choice of a model law:

> The abstract desirability of uniformity in law is the subject of much academic discussion . . . . In property law, uniformity might be desirable in some contexts but not others. On the one hand, land is quintessentially local, and some areas of property law (particularly conveyancing) often reflect local conditions and customs. In areas of property law where there is a lack of consensus on the best approach to a particular issue, having different states follow different approaches also may provide a laboratory of ideas to provide data on their effects. . . . In the estates and future interests area, a case can be made for uniformity because standardization in forms of ownership can better convey information and reduce transaction costs.

Id. at 25–26.

105. First, he recommends abolishing the fee tail across the United States—a modest proposal given that so few states still continue to recognize it. Second, Professor Barros would abolish the distinction between shifting and springing executory interests, given that

defeasible fee, merging the fee simple determinable, fee simple subject to condition subsequent, and fee simple subject to an executory limitation into one present estate—the Fee Simple Defeasible.[106] This merged estate offers two significant features. First, all future interests attached to it, whether in the grantor or grantee, are treated as contingent.[107] The major ramification of this decision is that all future interests attached to a defeasible estate become subject to the Rule Against Perpetuities.[108] This runs contrary to tradition, where the power of termination and the possibility of reverter in the grantor were not subject to the Rule Against Perpetuities.[109] Additionally, where the Rule Against Perpetuities voids the future interest, the current holder of the present estate becomes the owner of a fee simple absolute, rather than the owner of a defeasible fee.[110]

The second unique feature of Professor Barros's Fee Simple Defeasible is its treatment of future interests in the grantor. At common law, a grantor could retain one of two future interests when conveying a defeasible fee: a power of termination or a possibility of reverter.[111] The possibility of reverter took effect immediately upon the grantee, in possession of the present estate, breaching the condition attached to the land.[112] The power of termination, however, lacked automatic enforcement—the grantor could choose to exercise this "power" or could simply decline and allow the grantee to continue in possession.[113] Under Professor Barros's regime, the distinctions between the two would vanish, with one contingent future interest replacing the common-law grantor interests.[114] More importantly, this new future interest takes on the properties of the power of termination—the grantor, holding the contingent future interest, may end the defeasible estate only by asserting his or her power to terminate in writing.[115]

Professor Barros's future interest recommendations—collectively, his fifth reform overall—hold equal significance and share some

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there is little legal difference between the two beyond categorization and naming convention. *See id.* at 18.

106. *Id.*
107. *Id.* at 39.
108. *Id.* at 45.
109. *Id.*
110. *Id.* at 46.
111. *Id.* at 41.
112. BORRON, JR., *supra* note 5, § 281.
113. *See id.* § 241.
114. Barros, *supra* note 5, at 41.
115. *Id.* at 42.

commonalities with those of Professor Gallanis. Professor Barros would install a simplified future interest regime differentiating on the basis of vesting.[116] In part this stems from his treatment of all future interests as freely alienable, abrogating the common law's previously significant distinction between vested and contingent interests.[117] But unlike Professor Gallanis, Professor Barros retains the vested-contingent dichotomy, basing his decision on the intuitive logic behind the distinction, as well as the broader pragmatism undergirding his incremental approach to reform.[118]

Even so, Professor Barros offers a radical departure from the long-enduring, Anglo-American future interest regime. First, like Professor Gallanis, Professor Barros jettisons the destructibility doctrine, the Rule in Shelley's Case, and the Doctrine of Worthier Title, invoking his "clearing the underbrush" rationale for this change.[119] While Professor Barros retains much of the traditional Rule Against Perpetuities, he does make minor changes based on vesting, subjecting future interests in the grantor to the Rule while exempting the traditionally-susceptible vested remainder subject to open.[120] Finally, Professor Barros's model law prefers alienability and vesting through rules of construction: ambiguous conveyances will be interpreted to create vested future interests, and contingent future interests are interpreted in a manner that would hasten vesting.[121] Thus, in Professor Barros's ideal future interest regime, we are left with two categories of future interests: vested future interests (which may be indefeasibly vested, subject to partial divestment, or subject to total divestment) and contingent future interests.[122] Vested interests are in "an ascertained person *and* not subject to a condition precedent," whereas contingent interests are "*either* in an unascertained person *or* . . . subject to a condition precedent."[123] These future interests operate in a landscape stripped of feudal doctrines and emphasizing systemic alienability.[124]

116. *Id.* at 50.
117. *Id.* at 49.
118. *Id.* at 52–53.
119. *Id.* at 58–62.
120. *Id.* at 58–59. At common law the vested remainder subject to open was subject to the Rule Against Perpetuities. *See* LAURENCE ET AL., *supra* note 4, at 107.
121. Barros, *supra* note 5, at 62–63.
122. *Id.* at 20.
123. *Id.* at 50.
124. *Id.* at 30–31.

C. Problematics for These Modern Approaches

Pause for a moment and consider the systems proposed by Professors Barros and Gallanis. Both scholars undoubtedly accomplish their overarching goals: simplification, modernization, and promotion of alienability. Professor Gallanis makes the more radical recommendations: his system distills down to one future interest—period—which is fully alienable in life or at death, its only limitation a "super-alienability" doctrine mandating that it become possessory within ninety years of its creation. Professor Barros, though writing on the entire Anglo-American property scheme, takes a more modest approach: unlike Professor Gallanis, he retains the Rule Against Perpetuities with little change, and he distinguishes future interests based on vesting.

But both scholars create a substantially similar landscape in several ways. First, alienability reigns supreme, whether clothed in the raiment of "grantor's intent" or standing on its own two feet. Even if the market for certain future interests is weak or non-existent, the interests remain alienable—it is the interest holder's prerogative whether to barter them away, regardless of the price garnered. Second, simplicity remains at the forefront of the schema. Both scholars whittle down the categories of future interests substantially, eliminating a great deal of nuance for the sake of clarity and ease of understanding. Third, where changes are made, the grantee tends to reap the benefits. Both systems subject future interests in the grantor to the Rule Against Perpetuities (or its successor), and under this framework, the grantee often ends up holding in fee simple absolute—even if the grantor originally conveyed a defeasible fee or less-tangible future interest. The systems are undoubtedly easier to follow than the common-law regime, and some of Professors Barros and Gallanis' suggestions are well taken.[125] But these suggestions are not unencumbered by their own difficulties.

125. For instance, Professor Gallanis's detailed consideration of the Rule Against Perpetuities is the type of in-depth discussion often missing from debates about, say, the destructibility doctrine. It may be worthwhile to reform this law of alienability, perhaps by extending the perpetuities period beyond the classic "lives in being plus 21 years." Moreover, as Professor Barros recommends, protecting all vested remainders from the Rule would seem to make sense, given the conceptual difference between a right that is vested and one that is contingent. That being said, grantor's interests ought to remain immune from the Rule, owing to the idea that the ultimate locus of power ought to be with the original owner. Subjecting the grantor's reversion, for instance, to the Rule would have the systemic effect of shifting power away from the conveyer—who was the person in charge of dispensing that power in the first place.

1. The Defeasibility Reforms

Take Professor Barros's reforms to the defeasible fees. Recall that he proposes one defeasible fee—the Fee Simple Defeasible—to replace the tripartite, common-law scheme. At common law, the following conveyances operate differently:

O→A for so long as alcohol is never consumed on the premises.

O→A on condition that alcohol is never consumed on the premises; if it is, back to *O*.

Under the first conveyance, the grantee holds a fee simple determinable, and the grantor retains a possibility of reverter. The possibility of reverter is self-actualizing: upon the condition being breached, the possessory right instantly flows back to the grantor—no action needed.[126] The second conveyance, however, gives the grantee a fee simple subject to condition subsequent, with the grantor retaining a power of termination. Here, upon the grantee breaching the condition, nothing happens automatically: the grantor may choose to invoke her power of termination, or not.[127] The grantee's possession remains rightful until the grantor acts.[128]

This difference does not survive Professor Barros's model law. In his scheme, these defeasible estates—along with the fee simple subject to an executory limitation—become one. Moreover, the "future interest" held by the grantor operates like a power of termination, with the possibility of reverter effectively scrubbed from the legal rolls. The most glaring issue with this is its potential disregard for the perennial justification of such reforms: grantor's intent. Consider the following:

> CONVEYANCE 1: Grantor Bob would like his nephew, Phil, to have some land for his 21st birthday. But Bob knows as well as the next guy that Phil is a bit of a deadbeat—he's slovenly, prone to poor judgment, and an all-around louse. But Bob is hopeful that giving Phil something to work on and own himself might instill some much-needed work ethic in him. So he crafts the following conveyance: "I, Bob, give to you, Phil, Greenacre, to hold in fee simple for so long as you never have a kegger on the grounds."

126. *See* BORRON, JR., *supra* note 5, § 281.
127. *See id.* § 241.
128. *See id.*

> CONVEYANCE 2: Bob again, but this time he's looking to give his other nephew, Bill, something. Bill is an upstanding gent, a real cracker-jack of a guy (nothing like Phil). He's bound for law school and destined for greatness—the scion of the family. While Bob still wants to make sure his land is taken care of in the proper fashion, he is not terribly worried about Bill and his judgment. So he crafts the following conveyance: "I, Bob, give to you, Bill, Blueacre, to hold in fee simple on the condition that you never have a kegger on the grounds; if you do, I'll take Blueacre back."

At common law, the differences between Bob's conveyances matter. In Conveyance 1, Bob gets the land back as soon as Phil throws his (inevitable) kegger. But in Conveyance 2, Bob has options: if Bill screws up, Bob can choose to let it slide (everyone makes mistakes, right?) or take back the land. Maybe Phil showed up and had the party without Bill's knowledge. Regardless, Bob can rest on his laurels and deliberate as to Bill, whereas Phil has already reached his proverbial third strike (on the first kegger thrown).

Of course, all this evaporates in the Barros scheme. These two conveyances—regardless of wording, and certainly regardless of background narrative—become a Fee Simple Defeasible grant. Bob retains a contingent future interest, subject to the Rule Against Perpetuities *and* not self-actualizing. Perhaps with Bill this presents no problem—the new conveyance looks quite a bit like the common-law one. But the problem lies with Phil, who suddenly has a much better shot of holding onto Greenacre no matter his choices. Were Phil to breach the condition, Bob must act. And Phil could embroil the two in protracted litigation and gamesmanship in an effort to hold onto the property.

More broadly, the reforms deprive Bob from the outset of even the *option* to craft Conveyance 1. Now, if he wants to make a conditional conveyance to anyone, he is stuck with considerably attenuated power: he can give the grantee a defeasible present estate, but his retained future interest may be void from the start, and if it does manage to survive, it is effectively nothing more than a power to litigate. This for the man who began as "king of the castle," master of the Fee Simple Absolute that was his domain.[129] Perhaps Bob will just hold onto the land, rather than give

129. *See* LAURENCE ET AL., *supra* note 4, at 2–3 (noting that the fee simple absolute is the fullest complement of rights and "most complete form of ownership" available at common law).

away so much. And so we end up with a perverse (and unintended) result: *less* market-wide alienation of land stemming from a policy predicated on alienation.

Professor Barros's reforms would also have tangible, real-world impact, as illustrated by a recent Oklahoma case, *Ator v. Unknown Heirs*.[130] In 1954, Thelma Ator and her husband gifted a fee simple determinable to the Owasso Independent School District by warranty deed.[131] As a fee simple determinable, the gift was conditional, and the deed stated that the conveyance's sole purpose was to enable Owasso School District to maintain a football program on the land.[132] Owasso School District complied with the condition for forty years, building a football stadium and playing its games on the parcel.[133] However, the high school varsity team ceased playing its games on the parcel in 1994, and no district football teams played games on the parcel after September 2001; instead, the district permitted a private organization, the Future Owasso Rams, to use the parcel and its facilities.[134]

When Thelma Ator died intestate, her son and sole heir filed a quiet title action, arguing that the parcel was rightfully his given the district's breach of the condition.[135] The Oklahoma Court of Civil Appeals agreed with Mr. Ator, finding that the land had reverted back to Thelma Ator when the school district stopped complying with the conditions of the deed.[136]

While the nature of the conveyance was undisputed, its classification is significant, particularly considering Professor Barros's suggested reforms. Remember that the fee simple determinable belongs in the larger class of

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130. 2006 OK CIV APP 120, 146 P.3d 821.

131. *Id.* ¶¶ 2–3, 146 P.3d at 823–24.

132. The deed stated, in pertinent part:

> [T]his conveyance . . . is solely for the construction and maintenance on said property of a football playing field and stadium for the use and benefit of the students of said School District, for so long as said real property shall be used for such purposes as a part of a regularly organized and fully scheduled program of football practice and playing . . . . [A]nd . . . if at any time after the date hereof, [Owasso School District] shall fail to comply fully with the terms of this deed or said agreement or observe the spirit thereof, the grant shall become null and void and the full fee simple title to said property shall revert to and vest in [Mr. and Mrs. Ator], their heirs and assigns forever.

Id. ¶ 3, 146 P.3d at 823–24 (internal quotation marks omitted).

133. *Id.* ¶ 4, 146 P.3d at 824.

134. *Id.* ¶¶ 5–7, 146 P.3d at 824–25.

135. *Id.* ¶¶ 1, 9, 146 P.3d at 823, 825.

136. *See id.* ¶¶ 13, 18, 146 P.3d at 826–27.

defeasible fees;[137] typically created with language of duration, the fee simple determinable leaves the grantor with a possibility of reverter, which operates immediately upon the conveyance's condition being broken.[138] Thus, when the Owasso school district stopped playing football on the gifted parcel, it violated the terms of Thelma Ator's deed, thereby losing title to the land. In other words, the school district wrongfully possessed that land once it ceased football operations on it.[139]

Now apply Professor Barros's model to this conveyance. In its entirety, Professor Barros's reforms would leave Thelma Ator and her heirs with nothing, as her possibility of reverter would be subject to the Rule Against Perpetuities. Ms. Ator's conveyance, simply stated, is as follows: "Thelma Ator to Owasso School District for so long as the district plays football on the property (and upon football not being played there, back to Ator)." The language of duration indicates that Owasso school district now holds a fee simple determinable, and Thelma Ator a possibility of reverter. But this possibility need not vest within the lives in being plus twenty-one years. Theoretically, Owasso could continue to play football on this parcel forever. Thus, Ms. Ator's future interest, under Professor Barros's scheme, violates the Rule Against Perpetuities and, consequently, is void. Indeed, if Thelma Ator had wanted to condition the land grant on football operations alone, she is left with virtually no tools to do so; unless she ensures that her possibility of reverter will vest within twenty-one years of the lives in being contemporaneous with the grant, it will invariably run afoul of the Rule Against Perpetuities.

Even if Professor Barros's expansion of the Rule Against Perpetuities were not applied to Thelma Ator's conveyance,[140] Ms. Ator still encounters some difficulties. Under the Barros scheme, all defeasible fees merge into the Fee Simple Defeasible,[141] the consequence being that future interests held by the grantor are treated as powers of termination, rather than as possibilities of reverter.[142] In other words, under Barros's reforms, Owasso school district's present estate—its right to possess the parcel granted to them by Thelma Ator—would continue until the holder of Ms. Ator's

137. *See* 2 RESTATEMENT (FIRST) OF PROP. § 44 (AM. LAW INST. 1936).

138. *See id.*

139. *See Ator*, ¶¶ 13, 16–17, 146 P.3d at 826–27.

140. Professor Barros's application of the Rule Against Perpetuities to future interests in the grantor accompanying a defeasible present estate is not retroactive—the only provision in his model law not applied retroactively. *See* Barros, *supra* note 5, at 67.

141. *Id.* at 41.

142. *Id.* at 42.

contingent future interest asserts his or her power of termination in writing.[143] Unlike Professor Barros's expansion of the Rule Against Perpetuities, this reform *is* applied retroactively.[144] Moreover, equitable defenses typically inapplicable to the fee simple determinable (such as estoppel) are made applicable to the newly-merged Fee Simple Defeasible and its accompanying future interests.[145]

The consequences for Ms. Ator would be significant. Ms. Ator's interest would be transformed into a mere power of termination, rather than the possibility of reverter she intended to retain. As a result, Owasso school district would be in rightful possession of the gifted property unless and until Ms. Ator or her heirs asserted the power to terminate. But, at this point, Owasso could choose to embroil the parties in prolonged litigation, and it would have additional equitable defenses at its disposal that could potentially thwart Ms. Ator's original future interest. Compare this with the state of affairs in the actual case: upon the school district ceasing football operations on the gifted property, title to the land reverted back to Ms. Ator automatically. Owasso school district became a trespasser, not a rightful possessor—and the possibility of rightful ownership through adverse possession was at least fifteen years away.[146] Thus, the likelihood that Mr. Ator would have failed in his quiet title action under a Barros regime, as compared with his actual victory under current Oklahoma law, is substantially greater. This notion is particularly troubling given that Oklahoma has traditionally treated the power of termination as a much weaker interest than the possibility of reverter.[147]

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143. *See id*.; *see also* LAURENCE ET AL., *supra* note 4, at 13 ("[W]hen O creates a fee simple on condition subsequent, he is not entitled to possession until he demands possession.").

144. *See* Barros, *supra* note 5, at 67.

145. *Id.* at 43.

146. *See* 12 OKLA. STAT. § 93(4) (2011) (applying a fifteen-year statute of limitations for most property actions, apart from enumerated exceptions).

147. Ludwig v. William K. Warren Found., 1990 OK 96, ¶¶ 7–8, 809 P.2d 660, 662 (recognizing that, at Oklahoma common law, the power of termination was inalienable, while the possibility of reverter is alienable); Frensley v. White, 1953 OK 79, ¶ 5, 254 P.2d 982, 984 ("The estate remaining in the grantor after the conveyance of [a fee simple determinable] is a possibility of reverter *which he may convey, it being considered an interest in the land*. . . . Next, there is the fee estate upon condition subsequent which is a fee simple except that it may be terminated by the grantor by re-entry upon the happening of some possible event, subsequently. What remains to the grantor after the conveyance of such an estate is a power . . . *which is not an interest in the land and is not sufficiently in esse to be subject to conveyance*." (emphasis added)). *But see* 60 OKLA. STAT. §§ 29–30, 40 (2011) (abolishing the common-law rule against alienation of powers of termination).

Professor Barros's defeasible fee reforms, then, present concerns both in theory and in fact. They leave the powers of the grantor significantly attenuated: the landowner has fewer ways to convey her land and less of an interest in that land once conveyed. While the future interests accompanying the defeasible fees may be increasingly similar in operation under the law, including Oklahoma law, the common-law distinctions continue to matter, as evinced by *Ator*. And eliminating these distinctions skews the system towards grantees at the expense of grantors. In some ways, this runs counter to the modern preference for grantor's intent.[148] While the new system may be simplified and more streamlined, it carves out many of the privileges typically associated with ownership, favoring macro-alienability while weakening individual authority over real property.

2. The Feudal Future Interest Rules

Both Professors Gallanis and Barros propose eliminating the destructibility doctrine, the Rule in Shelley's Case, and the Doctrine of Worthier Title.[149] Further, both scholars make changes to the Rule Against Perpetuities.[150] In many ways, these are merely the denouement to a decades-long erosion; while the Rule Against Perpetuities remains intact in some form across the country,[151] feudal future interest rules have fared much worse.[152] But these doctrines have not garnered the robust defense (or, perhaps the requiem) that they have earned. And while their feudal roots may now be obsolete, the concepts themselves deserve a second look, especially in particular states and property regimes. Though the following discussion focuses on the destructibility doctrine for this second look, it offers observations likewise salient to debates over the Rule in Shelley's Case and the Doctrine of Worthier Title.

Principally, the destructibility doctrine states that a contingent remainder must vest before or at the time of the preceding estate.[153] If it does not meet

148. *See* 1 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE INTENT §§ 11.1–11.3 (AM. LAW INST. 2011).

149. *See* Barros, *supra* note 5, at 59–62; Gallanis, *supra* note 5, at 529-48.

150. *See* Barros, *supra* note 5, at 58–59; Gallanis, *supra* note 5, at 549–60.

151. Gallanis, *supra* note 5, at 550–53 (noting that the Rule Against Perpetuities, in some form, persists in most states).

152. *See* BORRON, JR., *supra* note 5, §§ 209, 1563, 1612 (detailing the state of the destructibility doctrine, the Rule in Shelley's Case, and the Doctrine of Worthier Title across jurisdictions).

153. *Id.* § 193.

this condition, it is destroyed.[154] For example, consider the following conveyance:

O→*A* for life, then if *B* is twenty-one to *B*[155]

O, the grantor, conveys to *A*, the grantee, a life estate, giving *A* the present right to possess the land for the duration of *A*'s life. *B* receives a future interest, and more specifically, a contingent remainder—a remainder because it follows a life estate, and contingent because it is conditioned on an event that may not occur.[156] At the expiration of the life estate—likely, *A*'s death—*B* may take the interest *if B is twenty-one*. Under the destructibility doctrine, if *B* is not twenty-one, his interest is destroyed, and the land returns to *O*, or to her heirs or devisees, as a function of *O*'s reversion.

Different rules apply, however, where the destructibility doctrine is not in force. If *B* is not twenty-one at the expiration of *A*'s life estate, *B* may still take the interest, provided he turns twenty-one at some point. The present right to possess will likely belong to the grantor, but at a price. Now the grantor effectively holds a defeasible fee, with the contingent remainder acting as an executory interest. Should *B* turn twenty-one at some point, he will gain *O*'s original fee simple absolute. This poses several problems, particularly when considered in light of the justifications for abolishing the destructibility doctrine.

The rationale for abolition of this doctrine most frequently turns on property law's ever-familiar friend—"grantor's intent."[157] But this argument is not as ironclad as it may first appear. Consider once more the conveyance above: the argument in favor of preserving B's contingent remainder would turn on an idea of what *O* wanted in the first place. That is, readers of the grant assume that *O* wanted *B* to turn twenty-one—full stop. If *B* is not yet twenty-one at the time *A*'s life estate expires, preserving B's contingent remainder in the hopes that it may vest later will work to effectuate *O*'s original intent. But consider the following scenario:

> Harry owns Blackacre in fee simple absolute. He's a self-made millionaire at the age of 24—no small feat—and Blackacre represents the culmination of this fortune: a sprawling property

154. *Id.*

155. Assume for all examples that *O* holds a fee simple absolute.

156. *See* BORRON, JR., *supra* note 5, § 111.

157. *See* Abo Petroleum Corp. v. Amstutz, 600 P.2d 278, 281 (N.M. 1979); BORRON, JR., *supra* note 5, § 193.

> that stands as an American Versailles. But Harry hails from humble beginnings—the son of farmers, Bob and Betty. Bob and Betty, elderly and ailing, still live in their modest farmhouse on their modest acreage. Harry decides to pay back his parents. Knowing he will be out of the country indefinitely on business, he starts drafting the following conveyance:
>
> "I, Harry, convey to Bob and Betty, Blackacre for life . . ."
>
> But Harry pauses. Given his plans and his parents' advanced age, he would like to ensure that Blackacre is cared for after their deaths. So he adds an additional clause:
>
> " . . ., then if he graduates law school, to my brother, Fred."
>
> Fred is Harry's older brother, who has been struggling for years to get through law school. Harry is hopeful that this "carrot" will finally push Fred over the finish line. But if Fred cannot graduate by the time that his parents' life estate expires, then good riddance: Harry would rather reassess his options for the property.

Admittedly, this hypothetical is long-winded and somewhat far-fetched—but intentionally so, as the intent of the grantor is not always so clear, either on the face of the conveyance or from contextual clues. Without Harry's direct testimony, a court may very well construe Harry's intent in error, believing him to have wanted Fred to graduate law school no matter what. Of course, Harry's intent is effectuated under the destructibility doctrine: if, at the time of the life estate's expiration, Fred has not yet graduated law school, Fred's contingent remainder is destroyed, and Harry reacquires the land via his reversion. But absent application of the destructibility doctrine, Fred's remainder remains. While Harry will get the present right to possess Blackacre, owing to his reversion, Fred can divest Harry of this right—and, indeed, hold Blackacre in fee simple absolute—as soon as he graduates law school.

This result poses numerous issues. First, the result is particularly perverse if Harry relied on the destructibility doctrine in crafting his conveyance. Not every state has abolished the doctrine,[158] and modern-day

158. *See* BORRON, JR., *supra* note 5, § 193 (noting that Oregon and Florida continue to recognize the doctrine).

conveyances may still be drafted in its shadow.[159] But both Professors Gallanis and Barros make their policy reforms retroactive.[160] Professor Barros notes that such retroactivity is not troubling given that, in many cases, it often will comport with the grantor's intent.[161] However, as the example above demonstrates, the grantor's intent is seldom self-evident, and retroactive application of destructibility reform may act to frustrate, rather than effectuate, the grantor's intent—irrespective of whether the grantor relied on an extant (or redacted) destructibility doctrine.

The second problem is one of math. A basic tenet of property law is that the grantor may not convey more than she holds.[162] For example, if *O* holds a life estate, she may not convey away a fee simple absolute;[163] she may, of course, convey a life estate to another individual, but that present estate will terminate with *O*'s death.[164] In the same sense, property transfers must distill down to a "1 = 1" transaction. If *O* holds a fee simple absolute and seeks to convey part of it, every piece of the fee simple "pie" must be accounted for.[165] To illustrate, consider the following scenario:

Deed 1: *O*→*A* for life

In Deed 1, *O* begins with a fee simple absolute. Seeking to convey away part of this, *O* gives a life estate to *A*. The remaining piece of *O*'s fee simple absolute is accounted for in *O*'s reversion. Mathematically speaking, this results in "Fee Simple Absolute = Life Estate + Reversion." Contrast with the following conveyances:

Deed 2: *O*→*A* for so long as beer is never consumed on the premises; if beer is consumed, to *B*.

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159. *See, e.g.*, Barros, *supra* note 5, at 64–65 (acknowledging the difficulties with applying reforms retroactivity given grantors' expectations at the time of the conveyance).

160. Professor Barros applies all of his reforms, save his Rule Against Perpetuities changes, retroactively. *See id.* at 64–66. Professor Gallanis uses the same tactic. *See* Gallanis, *supra* note 5, at 569.

161. Barros, *supra* note 5, at 66.

162. This principle may be described as *nemo dat quod non habet* ("No one transfers (a right) that he does not possess") or *nemo plus juris ad alienum transferre potest quam ipse haberet* ("No one can transfer to another a greater right than he himself might have"). *See Legal Maxims*, BLACK'S LAW DICTIONARY 1932, 1934 (10th ed. 2014).

163. *See* BORRON, JR., *supra* note 5, § 195 (describing fraudulent transfer of fee by life tenant).

164. *See* LAURENCE ET AL., *supra* note 4, at 6.

165. *See id.* at 17 ("Mathematically speaking, the sum of the present and any future interests must equal the fee simple absolute.").

Deed 3: *O*→*A* for life, remainder in *B*.

Deed 4: *O*→*A* for life, then if *B* graduates law school, to *B*.

Deed 2 has *O*, holding in fee simple absolute, conveying a defeasible fee (the fee simple subject to an executory limitation) to *A*. Should *A* violate the condition attached to his fee simple, the entire parcel of land will go to *B*, who holds an executory interest in fee simple absolute. Mathematically, this is "Fee Simple Absolute = Fee Simple Subject to Executory Limitation + Executory Interest." Deed 3 and 4 represent variations on Deed 1 in which *O*, the grantor, has included a future interest to a third party. In Deed 3, *B* holds a *vested* remainder, as it is not conditioned upon any event happening and is given to a person born and ascertained.[166] In this example, *O* holds nothing—the land is certain (or virtually certain) to go to *B* upon the expiration of *A*'s life estate. Thus, the conveyance equation becomes "Fee Simple Absolute = Life Estate + Vested Remainder."

Deed 4 is where things get interesting. Here, *B*'s remainder is contingent—unless *B* graduates law school, he cannot take. And because *B*'s remainder is contingent, *O* holds a reversion (should *B* fail to meet the condition, *O* will retrieve the property in fee simple absolute). Mathematically, the conveyance is "Fee Simple Absolute = Life Estate + Reversion + *Contingent Remainder*." Take particular note of the similarities to Deed 1. In terms of ensuring that all pieces of the Fee Simple pie are accounted for, *B*'s contingent remainder adds nothing. This math persists, regardless of whether the destructibility doctrine is in force. Unlike its vested cousin, the contingent remainder is unnecessary to account for the entirety of the fee simple absolute—a reversion or a vested remainder combined with a preceding life estate will always comprise the entire fee simple absolute.

Likewise, a defeasible fee combined with a future interest in the grantor or grantee (that is, either a possibility of reverter or power of termination in the grantor *or* an executory interest in the grantee) are in total equal to the fee simple absolute. That the contingent remainder is a mere footnote in the math of property transfers likely reflects the common-law destructibility

166. *See id.* at 26 (describing a remainder as vested when the remainderman is born and ascertainable, and the remainder becoming a present possessory interest is not subject to a condition precedent).

doctrine, as well as the common law's treatment of the contingent remainder as a mere "possibility" rather than as a concrete interest.[167]

But abolishing the destructibility doctrine does a disservice to this basic math. With Deed 4, should *B* fail to graduate law school by the time of *A*'s life estate expiring, *B*'s contingent remainder survives if the destructibility doctrine is not in place. While *O* will likely regain the present right to possess the land, she now holds what is most easily classified as a defeasible fee (more specifically, a fee simple subject to executory limitation). *B*'s contingent remainder, while not formally reclassified, now acts as an executory interest, capable of divesting *O* of her fee simple estate. Thus, the "alchemy" of the post-destructibility regime transmogrifies the "patient and polite" remainder into the violent, divesting, and traditionally indestructible executory interest.[168]

This result comports with neither common-law nor modern property concepts, regardless of destructibility. First, the contingent remainder is amplified beyond its traditional confines. It becomes as secure and concrete an interest as the vested remainder, if not stronger—the vested remainder, unlike this "saved" contingent remainder, does not divest the grantor of anything, but rather follows the natural expiration of the preceding, present estate. Moreover, preserving the contingent remainder frustrates the grantor's interests at several levels—an ironic outcome, considering the destructibility doctrine is typically abolished in the name of the grantor. Without destructibility, the grantor's reversion becomes subordinate to the grantee's contingent remainder.

This subordination is even more stark in cases of merger. Traditionally, component parts of a larger present estate will combine if held by the same individual.[169] Thus, if *O* conveyed a life estate to *A*, with a contingent remainder in *B*, and then subsequently sold her reversion to *A*, *A* would traditionally hold a fee simple absolute, as the reversion would combine with the life estate into the fee (as the math shows). But without destructibility, everything falls before the contingent remainder. *O* may still sell her reversion to *A*, but *A* may only hold the reversion and his present life estate separately—and he may still lose his reversion if at some point in time *B* fulfills the condition that limits his remainder. Given that the

167. *See id.* at 32 (discussing that, at common law, the contingent remainder was an insubstantial interest and, thus, was not alienable inter vivos); 2 TIFFANY, *supra* note 9, § 320 ("A contingent remainder is merely the possibility or prospect of an estate.").

168. *See* 2 TIFFANY, *supra* note 9, §§ 317, 364 (noting that remainders do not terminate the preceding estate, while executory interests do).

169. 1 TIFFANY, *supra* note 9, § 70.

reversion is traditionally viewed as a vested interest,[170] a grantee's contingent future interest defeating a vested interest originally in the grantor seems doubly concerning. In fact, this failure to allow merger ultimately defeats the grantor's intent, expressed by her decision to sell the reversion to *A*, the grantee. To paraphrase a maxim from contract law: absent destructibility, *B* receives more than he bargained for.

These possibilities suggest the presence of at least one broader concern with respect to the notion of ownership and autonomy. Grantors who own in fee simple absolute hold the most robust bundle of real property rights under the Anglo-American property scheme.[171] An interest in fee simple absolute is freely alienable, descendible, and devisable;[172] it commands the highest market value and imbues the owner with the fullest complement of powers and privileges.[173] But modern reforms to old feudal doctrines—including, for example, the broad-scale elimination of the destructibility doctrine from state law—have slowly and subtly chipped away at this complement of powers. While a change in the treatment of one type of future interest hardly constitutes a national crisis, it does require a previously neglected assessment of our state and national conceptions of private property (that is, privately-owned land) and the locus of power vis-à-vis individual ownership and third-party rights holders.

None of the rationales frequently trotted out adequately address these issues. First, the mere fact that the destructibility doctrine is cast as a "feudal relic"[174] is insufficient reason to abandon it without some debate. Legal rules and doctrines devoid of all logic and purpose, due to the passage of time or (perhaps) bad policy to begin with, ought not to remain on the rolls. But law may yet find new life in the shifting sands of societal development, and the original pillars that held it high may be organically replaced by new, if different, scaffolding. Purported desuetude, intoned as an incantation yet wielded as a blunt scythe, is a feature of the discussion, not the entire dialogue itself.

Moreover, given that property law is fundamentally local in this country,[175] a state-by-state analysis of common-law doctrines may be fruitful for determining the efficacy of particular ideas. Part III of this

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170. *See* 2 *id.* § 311a.

171. *See* LAURENCE ET AL., *supra* note 4, at 2–3.

172. *Id.*

173. *See id.*

174. *See* Gallanis, *supra* note 5, at 534 ("[T]he destructibility rule is a feudal relic inconsistent with modern law.").

175. *See* 1 TIFFANY, *supra* note 9, § 1.

Comment features such an analysis, tailored specifically to Oklahoma. Indeed, even in light of demands that property laws facilitate greater interstate commerce, Professor Barros acknowledges that United States property law may vary across state boundaries—and that such variance is justified and viable.[176]

Second, the topic of alienability frequently appears in arguments favoring reform.[177] But alienability occurs at multiple levels, and the alienability best served by abolition is macro in scale. That is, by empowering grantees, abolition ensures that land is likely to change hands downstream, to see more owners over a stretch of decades. An egalitarian argument[178] lives within this: treating the contingent remainder as indestructible presents opportunities for broadening the class of landowners and restricting the concentration of land in a few hands over time.[179]

But these potential benefits sometimes have downsides for the grantor. First, the *grantor's* power to alienate her land diminishes without the destructibility doctrine. The grantor is bound by the initial conveyance, and while the result may ultimately be faithful to her initial intention, faithfulness is not guaranteed. Regardless, the grantor is deprived of potential future opportunities to dispose of her land as she sees fit. More broadly, denying the grantor a second chance to alienate the land denigrates the grantor's capacity for intention. Abolition of the destructibility doctrine is, in part, justified on a reified notion of grantor's intent (or what is believed to be that intent). Thus, courts preserve the contingent remainder in order to effectuate the grantor's intent gleaned from the original deed.

This is a risky business at numerous levels. Courts may interpret the language of the instrument incorrectly—the grantor gave a contingent remainder, after all, and the face of the deed may not indicate how the grantor secretly hoped it would be treated. Moreover, the grantor, simply by virtue of being human, has a necessarily dynamic intent. By giving the contingent remainder's limitation new life after the expiration of the preceding estate, the grantor thus becomes bound to the "intent" embodied

176. *See* Barros, *supra* note 5, at 25–26 (discussing debates over uniformity).

177. *See, e.g.*, Gallanis, *supra* note 5, at 568 (offering as a proposed reform that all future interests shall be freely alienable).

178. *Cf.* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (upholding as constitutional under the Fifth Amendment's Taking Clause Hawaii's program of land redistribution aiming at excessive concentration of real property in too few hands).

179. Conversely, abolishing the destructibility doctrine may chill systemic alienation. Presented with fewer options for alienation, the grantor may choose to hold onto his land until death, rather than risk the land falling into unexpected hands.

by the original deed. But this intent may be stale—circumstances may have changed, and the grantor may seek to alienate her property in a different way than she initially intended.[180] Thus, the "grantor's intent" argument is more complex than its typical presentation, and certain feudal doctrines may actually do *more* service to the grantor's intent, in spite of myriad attacks levied against them.

A larger point lies at the heart of these criticisms: reforms like abolition work to both erode property rights and to transfer power away from the grantor. Merely by eliminating the destructibility doctrine, the grantor has fewer tools by which to convey her land. Nuanced division of real property is a hallmark of English and American property law; it is a familiar tenet of first-year property to discuss the "bundle of sticks" and the many ways in which that bundle can be divided and dispensed.[181] While simplification of the law is an admirable goal, it comes at a cost. Overly simplified systems of property subtly deprive the owner—arguably the party the system is most interested in protecting—of rights and privileges traditionally enjoyed. While modern trends make both vested and contingent remainders alienable, for instance, vested and contingent remainders are hardly synonymous. And, while placing the words of limitation before (rather than after) the words of purchase may seem irrelevant, such placement may truly indicate a choice on the part of the grantor, one signaling that the contingency is superordinate to the taker's taking. A system that boils down to the black and white of "present interest" and "future interest" loses this texture and nuance, making ownership, a fundamentally human activity, problematically two-dimensional.

Ultimately, systems of law are built and arranged around policy choices and foundational principles. They represent an application of grander notions concerning relationships and power. Thus, the American system—and certainly Oklahoma's—should be built around the grantor's foundational power, as an expression of society's broader notions of individual autonomy, freedom, and private ownership. Just as the plaintiff is the master of her claim[182] and the offeror master of her offer,[183] so too

180. *Cf.* 1 RESTATEMENT (SECOND) OF CONTRACTS § 41 (AM. LAW INST. 1981) (noting that an offer will lapse after a "reasonable time," or after the period for acceptance that the offeror has specified in the offer).

181. *See* CRIBBET ET AL., *supra* note 17, at 2–3.

182. *See* Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987) (noting that the well-pleaded complaint rule makes the plaintiff "the master of the claim").

183. 1 RESTATEMENT (SECOND) OF CONTRACTS § 29 cmt. a ("The offeror is the master of his offer.").

should the grantor be master of her house.[184] Public policy may still have something to say about tying up title over decades and centuries (as with the abolition of the fee tail and the discussion of the Rule Against Perpetuities), but the grantor should have a kaleidoscopic selection of alienation tools at her disposal, rather than checking "Column A" or "Column B." Oklahoma's grander ideas and political theories may offer justifications for such a selection.

III. Saving Feudal Doctrines Through Oklahoma History

This Part examines "first principles," both at the national and state level, as vehicles for reinvigorating and justifying anew common-law property concepts. Specifically, certain vestiges of feudal property law may find new life in the idiosyncratic history of Oklahoma. Admitted to statehood in 1907,[185] Oklahoma wrestled with cultural and ideological tensions from the late nineteenth through the early twentieth centuries.[186] From these tensions emerged unique conceptions of land ownership, autonomy, and political power—marriages between farmers burning with Christian fervor and Socialist organizers drawing on a movement that was avowedly anti-religious.[187] But such alliances of strange bedfellows arose for a reason: a yearning for the opportunity and self-actualization that was said to be the American birthright.[188] And seemingly incongruous political relationships drew from an ideological palette that was fundamentally American, providing the critical, interstitial adhesion between competing viewpoints and lifestyles. In this historical moment, with churning discourse, property law may avoid the crush of withering criticism, instead finding its phoenix-like rebirth.[189]

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184. Yes, this is the second musical reference of the article—this time from *Les Misérables*. *See* Jennifer Butt & Leo Burmester, *Master of the House*, *on* HIGHLIGHTS FROM LES MISÉRABLES (MCA/Verve 2003).

185. *See* BAIRD & GOBLE, *supra* note 3, at 177.

186. *See* JIM BISSETT, AGRARIAN SOCIALISM IN AMERICA: MARX, JEFFERSON, AND JESUS IN THE OKLAHOMA COUNTRYSIDE, 1904–1920, at 7 (1999).

187. *See id.* at 85–104.

188. *See id.* at 11–12.

189. Part III's argument is admittedly a *white* history of Oklahoma. Engaged dialogue about the experiences of both Native Americans and blacks in Oklahoma must be had, particularly with regard to land ownership; unfortunately, such dialogue is beyond the scope of this Comment. Additionally, Part III's argument is offered as merely one option, and in many ways, it focuses on the history of predominately white settlers because their experiences best comport with this Comment's overarching goal of providing alternative grounds for justifying the common law of property. Rich and nuanced debates may be had

The story begins with Thomas Jefferson. Beyond his political accomplishments, Jefferson was the ideological godfather of a diffuse, egalitarian vision of American democracy, where power was local and the farmer was the country's ideal citizen.[190] The semi-subsistence, republican yeoman farmer, in Jefferson's eyes, received strength and intellectual emancipation through his land, which allowed him to reach "virtuous, independent political judgments."[191] These "honest, moderately prosperous, and productive toilers" were the country's backbone, clear-eyed and rational, in contrast with industrial laborers and urban workers, whose dependence on others clouded their judgment.[192] These yeomen provided one rationale for Jefferson's signature domestic achievement: the Louisiana Purchase, from which Oklahoma was carved.[193] In the Purchase, Jefferson saw an opportunity for an eternal agrarian republic founded on the small land holder,[194] who was "the most precious part of a state."[195] In his thought and legacy, then, Jefferson represented the dream of individual autonomy, self-reliance, and economic opportunity, all within a landscape (ideally) devoid of wide disparities in property ownership and the crippling inequalities that followed such disparity.[196]

Jefferson's views on land and citizenship found their way into public policy in postbellum (and pre-statehood) Oklahoma. Following the Civil War, the United States government began a process of seizing lands held by Native Americans, often to resettle tribes that had not lived in Oklahoma prior to the post-war period.[197] However, a tract of land located in the center of the territory, formerly held by the Creeks and Seminoles, remained unsettled; it was these "Unassigned Lands" that became the beacon of westward expansion for earnest settlers looking to make their own way.[198]

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about whether the Native American property philosophy, which was far more communal and non-commercial, might lead to more convincing alternatives to the common law—perhaps even alternatives decidedly *against* reform proposals such as those suggested by Professors Gallanis and Barros. *See generally* DANNEY GOBLE, PROGRESSIVE OKLAHOMA: THE MAKING OF A NEW KIND OF STATE 44–47 (1980).

190. *See* WILENTZ, *supra* note 2, at 47–48.

191. *See id.* at 47.

192. *Id.* at 47–48.

193. *See id.* at 109–12.

194. *Id.* at 111.

195. THOMAS JEFFERSON, *II.7 To Rev. James Madison*, *in* JEFFERSON: POLITICAL WRITINGS 105, 107 (Joyce Appleby & Terence Ball eds., 1999).

196. *See id.*

197. *See* BAIRD & GOBLE, *supra* note 3, at 141; BISSETT, *supra* note 186, at 17.

198. *See* BAIRD & GOBLE, *supra* note 3, at 141, 147; BISSETT, *supra* note 186, at 17.

And these settlers hung their hopes immediately on an existing federal statute: the Homestead Act.[199]

Signed into law by Abraham Lincoln in 1862, the Homestead Act opened lands owned by the federal government to private settlement.[200] Citizens could file claims for up to a quarter section—160 acres of land—which they would own outright after living on and improving their plot for five years.[201] When the federal government initially maintained that the Unassigned Lands fell outside the Act's purview,[202] hopes turned to pressure, epitomized by the "Boomer" movement of the late nineteenth century.[203] The relentless Boomer "invasions" of Oklahoma—along with a grander desire by Midwesterners for agrarian settlement and commercial development—finally wore down the federal government's resistance;[204] in 1889, Congress amended the Indian Appropriations Act[205] to open the Unassigned Lands for settlement.[206] Pursuant to the amendment, Oklahoma opened its doors at high noon on April 22, 1889 in the now-famous Land Run.[207]

The policy of private ownership became pervasive following this initial giveaway, and the primary targets after the first Land Run were the Indian reservations across the territory.[208] Enabled by the Dawes Act,[209] the federal government broke up communally-owned tribal lands and distributed them as 160-acre allotments to individual Native Americans.[210] As tribal populations tended to be small, this process often—and unsurprisingly—left surplus acreage for government ownership after distribution, and this

199. BAIRD & GOBLE, *supra* note 3, at 141.

200. Homestead Act of 1862, 43 U.S.C. § 231 (1970) (repealed 1976)); *see also* BAIRD & GOBLE, *supra* note 3, at 141; BISSETT, *supra* note 186, at 17.

201. *See* Homestead Act of 1862, 43 U.S.C. § 231 (1970) (repealed 1976)); *see also* BAIRD & GOBLE, *supra* note 3, at 141; BISSETT, *supra* note 186, at 17. The Homestead Act itself was inspired by Jeffersonian themes of westward expansion and poverty relief through more egalitarian land ownership. *See generally* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (2d ed. 1995).

202. BAIRD & GOBLE, *supra* note 3, at 141–42; BISSETT, *supra* note 186, at 17.

203. *See* BAIRD & GOBLE, *supra* note 3, at 142; BISSETT, *supra* note 186, at 17.

204. *See* BAIRD & GOBLE, *supra* note 3, at 143–44; BISSETT, *supra* note 186, at 17.

205. *See* 25 U.S.C. § 71 (2012); BISSETT, *supra* note 186, at 17.

206. BAIRD & GOBLE, *supra* note 3, at 144–45. The amendment effectively paid off the Creeks and Seminoles to ensure there were no unresolved claims to the land and empowered the president to set a time for settlers to enter Oklahoma. *Id.* at 144.

207. *See id.* at 144–45; BISSETT, *supra* note 186, at 17.

208. *See* BAIRD & GOBLE, *supra* note 3, at 145; BISSETT, *supra* note 186, at 18.

209. *See* 25 U.S.C. § 331 (1994) (repealed 2000); BISSETT, *supra* note 186, at 18.

210. BAIRD & GOBLE, *supra* note 3, at 153; BISSETT, *supra* note 186, at 18.

acreage became fertile territory for additional settlements under the Homestead Act.[211] By the turn of the century, this homesteading had resulted in twin territories in modern-day Oklahoma: the Oklahoma Territory, comprising the state's central and western half, and the remaining Indian territory, comprising the eastern lands held by the Five Civilized Tribes.[212]

Exempted from the Dawes Act, the Five Tribes maintained a unique relationship with the federal government, which formally recognized their tribal governments.[213] But as settlers continued to flow into Oklahoma, forces inside and outside the state pushed to open the Indian territory for settlement.[214] This clamoring culminated in the Curtis Act,[215] which offered the Five Tribes a no-win situation: either they would dissolve their governments and divide their lands, or the federal government would do it for them.[216] The Five Tribes relented, proceeding to adopt the "civilized" policy of private ownership by divvying up their communal lands among their members.[217] By the eve of statehood in 1907, Oklahoma had shed competing land ownership arrangements in favor of the homestead ideal, with the small landholder emerging as central to the state's ethos.

This "yeomen" focus also pervaded one of the more unique political movements in Oklahoma's history—the rise (and fall) of the state's Socialist Party.[218] The Socialist Party—always a minority movement in the United States—arguably found its strongest iteration in turn-of-the-century Oklahoma, reaching its acme during the 1910s.[219] The state party derived much of its strength from its recognition of agrarian anxieties, offering hope in the face of national neglect for non-industrial workers.[220] With a membership heavily comprised of farmers and agricultural laborers, Oklahoma socialists aimed to realize the American Dream through a nuanced, multifaceted indictment of commercial exploitation and class conflict.[221] Consequently, the Party fused political and cultural crosscurrents into a unique theory tailor-made for the region, drawing

211. BAIRD & GOBLE, *supra* note 3, at 146, 153; BISSETT, *supra* note 186, at 18.
212. BAIRD & GOBLE, *supra* note 3, at 163–64; BISSETT, *supra* note 186, at 18.
213. BAIRD & GOBLE, *supra* note 3, at 153; *see* BISSETT, *supra* note 186, at 18.
214. BAIRD & GOBLE, *supra* note 3, at 155; BISSETT, *supra* note 186, at 18.
215. *See* 25 U.S.C. § 331 (1994) (repealed 2000); BAIRD & GOBBLE, *supra* note 3, at 156.
216. BAIRD & GOBLE, *supra* note 3, at 156; *see* BISSETT, *supra* note 186, at 18.
217. BAIRD & GOBLE, *supra* note 3, at 155–56; BISSETT, *supra* note 186, at 18.
218. *See* BISSETT, *supra* note 186.
219. *See id.* at 3.
220. *See id.* at xv, 5.
221. *See id.* at 7–8.

heavily from three particular areas: "(1) the Jeffersonian emphasis on the common man, the dignity of labor, and the importance of the land . . . (2) the scathing indictment of capitalism set down by Karl Marx . . . and (3) the evangelical Protestant tradition that had been central to the American experience since the Great Revival of the early nineteenth century."[222] Together, the "Marxist message of class conflict," "Jeffersonian promise of yeoman democracy," and "moral authority of Christianity" proved a potent organizational platform and ultimately infected the state's entire political discourse, framing the arguments made by both Republicans and Democrats seeking office.[223]

The driving force behind the Party's success and strife was one omnipresent object: land.[224] Low crop prices in the early twentieth century sharply increased the ranks of tenant farmers;[225] by 1910, tenants outnumbered landowners in Oklahoma, with the average rate of tenancy at fifty-five percent and nearing ninety percent in certain counties.[226] This reality was particularly odious given that Oklahomans viewed farming as an idyllic and quintessentially American pursuit.[227]

Into the breach stepped the Socialist Party. Seizing upon the ideological innovations of preceding organizations and movements,[228] the Party sought to address two central issues for skeptical small farmers: (1) whether a party generally opposed to private property would support farmers owning their lands and (2) whether the party's organizational structure would reflect the egalitarian tones of its platform.[229] Oklahoma socialists quickly realized

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222. *Id.* at 7.

223. *Id.* at 7–8; *see also id.* at 7 n.4 ("Oklahoma socialists inherited a reverence for the Jeffersonian ideals of democracy and the importance of the yeoman farming class for the maintenance of the American democratic tradition.").

224. *See id.* at 11–12, 62.

225. *See id.* at 9–10.

226. *See id.* at 11.

227. Bissett offers the following assessment:

> To this majority of Oklahoma farmers, the crisis on the land was made all the more objectionable by the exalted position farmers were purported to occupy in American society. All farmers, even the most impoverished tenants, had internalized the Jeffersonian notion that yeoman farmers represented the bedrock of American democracy. Yet the dream of yeoman democracy, portrayed in glowing terms by countless politicians attempting to invoke Jefferson's memory, conflicted with the life experiences of those involved in the labor of farming.

Id. at 11-13.

228. *See id.* at 22–23, 61–64 (discussing Indiahoma Farmers' Alliance).

229. *See id.* at 60–62.

that communal ownership of farmlands was neither politically nor ideologically advantageous, developing instead a political philosophy that addressed systemic inequalities through greater diffusion of land ownership.[230] Far from being the utopian end-goal, land collectivization embodied the specter of tenancy for Oklahoma farmers.[231]

Thus, the Socialist Party resolved the central tension between the "Marxist demand for land collectivization [and] the Jeffersonian ideal of autonomous yeomen farmers" by calling for wholesale ownership reform: only by "returning the land to those who worked it" could the state's broader inequalities be cured.[232] By 1912, the Party officially supported redistribution of farmland to tenants in an effort to expand the ranks of owners in Oklahoma.[233] The party structure also reflected this broadening of the "property franchise," with calls for democratization met by decentralized power and a more egalitarian framework to complement the "yeomen" focus of the Party.[234] While the Socialist Party of Oklahoma declined abruptly following the First World War,[235] its ideals did not die out—indeed, they reflected the more institutional forces that had culminated in the state's constitution just a few years earlier.[236]

Conclusion

What does any of this have to do with property law derived from feudal England? In one sense, not a great deal—but in a more significant sense, more than one might think. Law is ultimately an expression of policy positions and competing conceptions of the societal good; it speaks in a language that flows from the broad notions that structure and govern a given polity. Oklahoma offers source material for these notions. Themes of individual land ownership, egalitarianism, and hard-earned economic opportunity abound in Oklahoma's early social and political history. These

230. *See id.* at 66 (noting how an Oklahoma newspaper editor "effortlessly combined a Marxist understanding of the agricultural crisis . . . with Jefferson's tenet that only through freehold tenure could a measure of equality be attained in American society").

231. *See id.* at 67.

232. *Id.*

233. *See id.* at 68.

234. *See id.* at 82–84.

235. BAIRD & GOBLE, *supra* note 3, at 182–83.

236. Oklahoma's constitution was looked at as the ideal of the American Progressive movement. Specifically, the constitution struck out against monopolization, and it eliminated restrictions on land such as primogeniture, entailments, and multigenerational encumbrances on title. *See* GOBLE, *supra* note 189, at 214-18.

themes, when juxtaposed against prevailing property law, offer a new rationale for doctrines and classifications lambasted as useless and archaic.

Compare this notion to modern proposals for property law reform. Contemporary reforms aim to make the system more efficient, simpler, and clearer. Moreover, the reforms operate on the idea that the grantor's intent is the North Star for construing deeds, with society's general preference for free alienability and marketability of property interests acting as important background information for this intent.

Yet the reforms seem to culminate in disparate results. Abrogating the destructibility doctrine, for instance, may promote land alienability—it increases the likelihood real property will end up in the hands of someone other than the grantor—but it alienates at the cost of the grantor's intent, which is the paramount factor in land transactions. Conversely, chipping away at the Rule Against Perpetuities empowers the grantor to tie up her land for multiple generations—but this of course leaves less land for market, stunting alienability in the long term. Further, ever-simpler menus of future interests mean the grantor is left with fewer options by which to divide her land, even though such division—temporally, conceptually, physically—is a hallmark of the Anglo-American system of law. Thus, even if things like intent and alienability *should* guide legal policymaking, it is not at all clear that the reforms up for consideration today actually accomplish these goals.

Feudal doctrines recast in light of regional "first principles," like those of Oklahoma, however, may serve as potential agents for the two central goals of modern property law—effectuating the intent of the grantor and promoting the alienability of land. While scholars castigate the destructibility doctrine as an unjustified handmaiden of the outmoded "abeyance in seisin," Oklahomans may find use in this doctrine as a tool both for empowering the landholder who reigns supreme in the state's mythology and ensuring that the state's policy favoring alienation remains rooted in the notion that the "grantor as owner" is the fundamental locus of power and authority vis-à-vis real property. Likewise, the Rule Against Perpetuities takes on new meaning as a policy statement contextualizing land transactions in Oklahoma; drawing on its constitutional foundations, the Rule announces an overarching societal judgment *against* the dead hand of the past and long-range encumbrances on title. And rather than an echo from England's feudal past, the Rule may now be viewed as an outgrowth of the state's rugged individualism, its belief that man ought to be self-made and wealth ought to flow freely among citizens instead of accumulating over time in fewer and fewer hands. Even the classificatory

scheme of present estates, the allegedly tedious and meaningless distinctions between the power of termination and the possibility of reverter, might survive unscathed, its complexity now acknowledged as a rich heterogeneity that offers the landowner a panoply of options by which she may interact with her property. Run the steady standbys of property law through this new, state-specific framework and see what sticks—the old "relics" of feudalism may find new life yet on the American frontier.

Gerard Michael D'Emilio