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REDISTRIBUTING WEALTH BY CURTAILING INHERITANCE: THE COMMUNITY INTEREST IN THE RULE AGAINST PERPETUITIES AND THE ESTATE TAX

JOHN W. VAN DOREN*

I. INTRODUCTION

The system of private property in the United States has led to a vast concentration of wealth and power in the hands of a few. One highly regarded study determined that the top one percent of the adult population held almost 30 percent of all the personal assets in this country, including 76 percent of all corporate stock.¹ Another study revealed that this top one percent holds 92 percent of all trust holdings.² Future interest, trust, and tax avoidance devices have made such wealth concentration possible by testamentary fiat.³

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1. R. LAMPMAN, *THE SHARE OF TOP WEALTH-HOLDERS IN NATIONAL WEALTH 1922-56*, at 24, 227 (1962).

2. "The important source of accelerating wealth for the very rich is ownership income derived from stocks, bonds, and other interests in the productive system. The concentration of productive wealth is more pronounced than the concentration of income, and despite the serious lack of information as to the identity of the real owners of the largest blocks of stocks and bonds in America, one can learn that the trend is toward more concentration. In 1953, the richest one percent of all adults owned ninety-two percent of all trust holdings. More recent figures show no change." Figures show that income distribution is not as unbalanced as wealth distribution due, of course, to the imposition of the personal income tax. Nevertheless, in 1969 the richest 20% of American families took home 45 percent of the income. Barnett & Müller, *A Reporter At Large, Global Reach-II*, *NEW YORKER*, Dec. 9, 1974, at 100, 121. See generally Lydall & Lansing, *A Comparison of the Distribution of Personal Income in the United States and Great Britain*, 49 *AM. ECON. REV.* 43 (1959); H. TUCKMAN, *THE ECONOMICS OF THE RICH* (1973).

Current figures on wealth concentration in trusts are hard to obtain, but ample evidence exists that substantial wealth transmission is not precluded by transfer tax. Waterbury, *Some Further Thoughts on Perpetuities Reform*, 42 *MINN. L. REV.* 41, 47 n.32 (1957) (30% of trust industry reports about 13,900 trusts averaging some \$15,000 income per year; over 7,000 trusts over \$25,000 income, average unknown; also unknown are private trusts not employing a corporate trustee); Woolfson, *Inheritance Taxation and Maladjustment of National Income*, 65 *TRUSTS AND ESTATES* 371, 372 (1937) (formerly TRUST COMPANIES) (figures not readily available, but 1912-1923 spot check by FTC indicated 1% of estimated decedents owned 59% of estimated wealth; average estate was \$3,800, over 91 percent had less; greatest number in \$1,000-\$2,500 range; total value greatest in estates of \$1 million and over); Comment, *Ancient Rules and Modern Trusts*, 18 *U. CHI. L. REV.* 92, 99 n.28 (1950) (\$50 billion estimated to be held by trustees in 1939). Woolfson notes that income tax returns around the time of his writing confirmed the pattern of concentration.

3. See Note, *Power and Probability of Alienation and the Scope of Judicial Control over Actual Alienation*, 27 *COLUM. L. REV.* 959, 968 (1927).

In the United States holders of this concentrated wealth wield power greatly disproportionate to their numbers. That power is often unrelated to the holders' own efforts or achievements. Socialistic or communistic methods of distributing wealth have, in practice, led to a no more desirable result, as they produce a concentration of wealth and power in the hands of the government or governmental officials. Yet it is possible to envision a system that does not promote concentrations of private or public wealth in the hands of the few. Such a system would foster the democratic values of equal opportunity in the marketplace and the arena of government. Modifying the present wealth transmission process to further this objective can be viewed as a "private" Sherman Anti-trust Act, related not to corporate monopolies, but to concentrations of privately held wealth.

The law of property exists in part to resolve the tensions between vying private claimants and between private claimants and the government. However, the law also has a broader impact on society, an impact that requires reevaluation of existing doctrines in light of their effectiveness in supporting important underlying social values. Inheritance law is not inherently right because it reflects the particular balance of a former day. The objective of this article is to suggest reconsideration of a legal system that allows large concentrations of wealth to be repeatedly devolved over a century or more, or even over an indefinite period of time, without being subject to taxation. The primary focus of this article will be on using the Rule against Perpetuities and estate taxation to effect a redistribution of private wealth in this country so as to reduce its concentration. The article also analyzes the form of property holdings; the recent treatment of the Rule by scholars and by courts; and other considerations in curtailing inheritance, including methods of taxation.

II. THE EFFECT OF NEW FORMS OF PROPERTY HOLDINGS

Concentration of wealth in the hands of a small percentage of the population is alarming in itself. But the impact of wealth concentration has been increased by the new forms of property holdings employed today. Those forms present an opportunity to assert a more pervasive control over economic and political power in this country than ever before.

A. Personalty

Forms of wealth and legal doctrine may interact to affect the pattern of wealth devolution through the generations.⁴ Today, shifts

4. For a discussion of how the form of property affects property doctrine see Lynn,

and changes in property forms have led to vast wealth concentrations in private hands that are largely subject to inheritance through traditional legal channels. One prominent shift of wealth following the industrial revolution was from the form of realty to that of personalty. Stocks, bonds, and interests in other intangibles replaced land as a major wealth form.

Due to this shift and the increasing use of the trust form for holding securities, the Rule against Perpetuities as a rule promoting alienability of property has become relatively unnecessary. The trustee often has a power of sale over securities even though the beneficial interests are subject to future interests. Securities are held in a fund which can be made productive by the corporation, despite future interests in the shares. But the trust device has also made possible long periods of continuous management that facilitate concentration of this newer wealth.

B. The Corporate Share

After the industrial revolution, the corporate share achieved prominence as a form of ownership. The corporate share made it possible to hold wealth through a convenient and legally protected entity, the corporation. Extensive movement to the corporate form resulted—a movement that has prompted little reconsideration of devolution doctrine. This new form of property holding is especially significant because it tends to divorce ownership from managerial control. Though the corporation is the correlative of the shares, it is difficult to gain effective managerial control of some widely held corporations through share ownership. In those instances it appears that control is continued through self-perpetuating, elite boards and officers. This power concentration is aggravated by the interlocking directorates and pyramidal holding companies attendant on the corporate form. Thus, as Professor Berle has pointed out,⁵ a relatively small group of managers, often known only to each other, may control extensive commercial and industrial enterprises.

C. Quasi-Public Property

The trend toward the abstraction of property was further accentuated in the 1930's by growing interests in pensions and profit sharing funds, mutual funds, and the like. Wealth held in these forms has been called quasi-public property because the theme of public

Legal and Economic Implications of the Emergence of Quasi-Public Wealth, 65 *YALE L.J.* 786 (1956).

5. See A. BERLE, *POWER WITHOUT PROPERTY* 51, 117 (1959).

interest is present even though there is no state ownership.⁶ The managers of these funds do not own the shares, but can vote them. This arrangement continued the trend toward separation of ownership and control, referred to by Berle as "power without ownership of property."⁷

Some of this wealth is controlled by private commercial banks, often through trusts which can vote the stock comprising the corpus. In the property bundle of sticks, the "voting stick" may thus be transferred in significant part to the same group of interlocking directorates that controls much corporate wealth.

D. Government Largesse

Governmentally parceled "rights," called the "new property" or government largesse, may constitute another stage in the development of property forms. These rights include government contracts and subsidies, licenses for air and mass communication, franchises that may be worth more than the physical inventories, welfare payments, unemployment insurance, and workman's compensation.⁸ These are unlike traditional forms of wealth such as land or tangible personalty in that government has created them by reallocating wealth.

Publicly dispersed wealth appears to be increasing, but it is fallacious to suppose⁹ that this somehow reduces private property's importance as wealth subject to individual devolution. The shift to government largesse, giving an increasingly public character to wealth and its creation, has actually created little change in wealth transmission. In brief, those controlling private wealth also have control and favored access to the new forms of public wealth. Those most frequently receiving government allocations in this new form are the rich and powerful.¹⁰ Regulatory and licensing agencies of government are often controlled by the industries they seek to regulate.¹¹ Powerful capital concentrations are able to graft the name "right" onto economic advantage secured from government and vest it in themselves.

6. See R. LYNN, *THE MODERN RULE AGAINST PERPETUITIES* 182 (1966).

7. A. BERLE, *supra* note 5, at 51.

8. See Reich, *The New Property*, 73 *YALE L. J.* 733 (1964).

9. *But see* Phillips, *Social Control Through Taxation of Estates and Trusts*, 23 *CORNELL L.Q.*, 113, 115 (1937), taking a view that taxation to fund government expenditures diverts capital that would have been used in "building up the business of the country."

10. See Reich, *supra* note 8, at 765.

11. *Id.* at 768. See *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting); E. KEFAUVER, *IN A FEW HANDS* 191 (1965).

III. POLICY AND HISTORY OF THE RULE

When the law addresses itself to vying claims of private individuals, it often pretends that no larger issues are involved. Yet the affirmation of the right of a private claimant, such as a beneficiary of a will, involves profound societal ramifications. Affirmation of an individual's property rights means, for example, that the state cannot redistribute his property. It also involves a decision that the beneficiary gets most of the benefit of societal contributions to property value.

Resolving issues under the Rule against Perpetuities involves conflicts between individuals. Lurking on the periphery, however, are issues of taxation involving the individual and the state. Resolution of taxation issues determines whether the laissez-faire model will prevail, and distribute property according to what is called a market mechanism, or whether the alternative concepts of government "intervention" or "interference," themselves shrouded in pejorative, will prevail. In the latter situation, the notion that property exists to serve human needs can be recognized through redistribution of wealth by the government. Thus the Rule against Perpetuities involves much more than the competing interests of private parties. Since the Rule permits tying up property free of the estate tax for several generations, the Rule is an accomplice to preserving concentrations of wealth and power.

We can see that modern property is based increasingly on control and control devices. This focus on control is a further step away from traditional ownership concepts, and a further step toward wealth and power concentrations. These realities might have led to a stricter Rule against Perpetuities; interestingly enough, they did not. The permissiveness of the Rule was extended to personalty, for instance, apparently without much thought that new measures might be necessary. There continues to be an unfortunate lack of attention to this situation and the legal system which perpetuates it. Historically, future interest doctrine was used to balance power relationships. Today reform of the legal superstructure of inheritance is even more necessary than before to reduce the concentrations of privately held wealth.¹²

A. Early Future Interest Law

Early future interest law and policy reflected conflicts over wealth concentration, the division of property control between the living and the dead, alienability, and the balance of power between competing

12. See Bale, *Whither Death Duties: A Lifetime Accessions Tax, A Lifetime Donor's Tax or the Green Paper?* 1974. PUB. L. 121.

classes of society. It is often overlooked today that one of the original purposes of the Rule against Perpetuities was to prevent land from being held in family dynasties forever.

The development of future interest law reflected efforts by the lords of the manor to keep land wealth concentrated in their hands rather than permit it to pass to the King or to lesser lords.¹³ In this context, the King's courts were generally hostile to future interests. Prior to the Statute of Uses (1536) and the Statute of Wills (1540), feudal incidents akin to the contemporary estate tax fell due upon descent of property by intestacy. Inter vivos transfers or transfers to a trustee, recognized by equity, incurred no feudal incidents.¹⁴ These devices were used to evade feudal incidents, some not unlike the estate tax. Hence, the doctrines of Shelley's Case¹⁵ and Worthier Title¹⁶ were tax imposition devices of the ruling power structure. The destructibility of contingent remainders and the ability of a tenant in tail to convey a fee simple, either upon birth of issue or, after *Taltarum's Case*, by common recovery, can be viewed in the same perspective.¹⁷

Why is the battle for and against feudal incidents now viewed as "purely historical"?¹⁸ The struggle for control and power that was a reality in feudal society is still a reality today. The feudal struggle focused on the trust. While the law side of the English courts did not recognize the trust, equity came to enforce it at least as early as the Fourteenth Century. The trust provided a freedom to transfer property, through what were in effect future interests, in avoidance of feudal incidents. Trust devices thus enabled members of the landed classes to keep land in the family.¹⁹ The resulting drop in royal revenues led to a power struggle between Henry VIII and the greater and lesser nobility. The Statute of Uses was enacted to restore the King's power to exact revenue on the devolution of land at death.

The rules governing freedom of testation that grew up in England were aimed at maintenance of fortunes in the great families of the landed gentry.²⁰ As land became more available upon the breakup of

13. 5 R. POWELL, REAL PROPERTY 538 (1968) (King wished to limit dynastic impulses of his competitors).

14. See A. GULLIVER, FUTURE INTERESTS 29 (1959).

15. See T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 544 (5th ed. 1956).

16. See A. GULLIVER, *supra* note 14, at 30.

17. See W. LEACH & O. TUDOR, THE RULE AGAINST PERPETUITIES 14-15 (1957).

18. See A. GULLIVER, *supra* note 14, at 21, 26-29.

19. See R. POWELL, CASES ON FUTURE INTERESTS 2, 19 (3d ed. 1961). See also Holdsworth, *The Political Causes Which Shaped The Statute of Uses*, 26 HARV. L. REV. 108 (1912), on whom Powell relies.

20. See Nussbaum, *Liberty of Testation*, 23 A.B.A.J. 183 (1937), citing MAX WEBER, SOCIAL ECONOMY (1921).

the manorial feudal system, judges continued to be responsive to elements seeking land as a major form of wealth. A parallel development occurred on the continent of Europe. Devices amounting to future interests existed in German civil law. Wealthy classes used these devices to preserve their position; in some areas they could only be used by the aristocracy. In France, the Revolution led to the overthrow of similar devices used by the aristocracy to preserve vested privileges.²¹ English curtailment of future interests and other "estate planning" devices served interconnected purposes: to prevent the evasion of feudal incidents and to prevent the concentration of power gained by tying up property in one family.²² The revenue purpose of anti-future interest doctrines may well have been as significant as any other.²³ Thus the English sought to prevent capital concentrations by allowing fee ownership in an heir so that the land could be transferred, or squandered, and thereby reduce the size of the estate from time to time.

Historically, taxation (or feudal incidents) and anti-future interest doctrine have been used in tandem to adjust wealth and power concentration. In England, the battles between various levels of gentry and aspiring gentry were fought with transfers through "purchase" and transfers by descent. If the interests passing upon death of the life tenant passed by descent, the overlord gained feudal incidents such as relief, a counterpart of taxation. Insofar as transfers occurred by words of "purchase," feudal incidents were usually not payable. If the words were those of "limitation," feudal incidents were payable. Thus at common law if a property was transferred to *B* and his heirs, the heirs took no interest; the words "and his heirs" were construed to be "words of limitation." The result was that the overlord gained feudal incidents when the property descended on *B*'s death. Since future interest holders took by purchase and not by descent, the holders of power in the feudal society had a policy against recognizing future interests. But insofar as property could be parceled out and controlled through future interests, the wealthy accomplished the functions of estate planning.

Equity provided counterpoint by moderating the tendency of the law courts to curtail future interests sharply and thereby preserve incidents. Later doctrines, including the Rule, were used in connection

21. See Rheinstein, *Some Fundamental Differences in Real Property Ideas of the "Civil Law" and the Common Law Systems*, 3 U. CHI. L. REV. 624, 630 (1936) (analyzing German and French use of civil law equivalents of future interests).

22. See Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 726 (1952).

23. See A. GULLIVER, *supra* note 14, at 26-29.

with varying feudal incidents to curtail and adjust capital concentrations in some potentially powerful social strata. This purpose has been ignored or soft pedaled by the current literati of the Rule.

Feudal incidents fell into disuse, but estate taxes payable to the state appeared as a substitute. As estate duties grew the battle lines formed more clearly between varying interest groups, e.g., landowning against mercantile classes, and both of those against the British state. In adjusting new power realities in a society, some doctrines may remain deceptively placid, while the conflicts are fought out in related areas. Thus the Rule remained somewhat static in England while commercial and landowning groups fought over what was exempt, excluded, and deductible from the estate tax.

B. Static Quality of the Rule Today

Perhaps we ask too much of the Rule. It never had as its social purpose the promotion of a democratic society. However, the Rule and tax structure, with the help of trusts, not only foster our existing wealth concentration, but contribute to its undemocratic effects. For instance, when the Rule is applied, the estate is often treated as an outright bequest and denied a free tax ride on a generation-skipping transfer. The result is a glaring example of favoritism to those able to purchase advice from persons trained in the magic of the Rule, remainders, and powers of appointment. Insofar as the Rule allows transfers by the multigeneration trust to escape estate taxes imposed on outright bequests, the generosity of the Rule merges with the generosity of the tax structure in a happy coincidence for the rich and powerful. Moreover, recent cases and legislative "reform" movements indicate a trend toward preventing orthodox applications of the Rule. These movements often cause a hidden subsidy to pass *sub silentio* to the users of multigeneration trusts.

The reason for the relatively static quality of the Rule today can be traced either to use of tax doctrine to resolve conflicts, or to the political power of the benefited classes coupled with the inability of those less favored economically to comprehend and reach this vestige of privilege. A potential conflict in the Rule's policies exists because the state's power to tax stands in opposition to the individual's claim to accumulate. The state could both tax and curtail the propertied groups' privilege to devolve property through the generations. But in the United States propertied groups have significant control in the government, so the Rule and estate tax remain relatively static.

It is significant that during the early development of this country inheritance was not an issue. Both the landowning aristocracy and

what became the industrial aristocracy had a tacit common interest in maintaining their position through a permissive inheritance structure. Not until those classes were somewhat demoralized by the Depression were significant inroads made by the taxing structure. Thus, except for imposition of a relatively minor estate and gift tax and, more indirectly, by levy of the income tax, no real challenge has been posed to this inheritance picture.

C. Deficiencies in the Scholarly Treatment of the Rule

There is little discussion of the Rule's policy of preventing wealth concentration, and indeed little discussion of the reasons for the Rule at all. Despite the work of the legal realists, the current mode of legal analysis is still to rationalize decisions and statutes into sets of doctrine. Excessive emphasis on the current legal positivism tends to obscure questions of underlying social purpose and the need for justification of the status quo. It is somewhat disturbing that even those who are sensitive to the underlying policies of legal rules are not able to bring about more discussion of those policies. Perhaps most students in a law school population that consists of lower-middle and middle classes are not interested in this analysis. The lower-middle class law student, on the move upward, gains little by questioning the existence of a given tendency. He sees his job as simply learning the Rule. Moreover, he sees himself as potentially sharing in the power of the class benefitted by the Rule. Middle class students are also upward bound. They view themselves as participating or about to participate in the privileges the legal structure bestows. Often students are able to get through an introductory course in future interests and the Rule against Perpetuities without giving undue thought to meaningful alternatives that could eliminate the privileges entrenched by the Rule.

Scholarly comment also avoids significant examination of the reasons for the Rule.²⁴ The private wealth pattern that the Rule permits, or meaningful policy alternatives that would change the pattern, are rarely even considered. I suggest a few reasons why. First, there is an implicit assumption that inheritance is an appropriate incident of private property. Second, commentators are often members of the classes benefitted by the status quo. Third, their expertise and reputations in the field create a heavily vested interest in the existing "technology" of the Rule. Finally, some commentators may fear that

24. See, e.g., Jones, *The Rule Against Perpetuities and Powers of Appointment: An Old Controversy Revived*, 54 IOWA L. REV. 456 (1968) (very little attention given to reason for Rule); Comment, *supra* note 4, at 94-95 n.9 (policy foundations of present Rule period have not been adequately considered).

radical reforms might not be effective due to the great tendency of future interest legislation to foster litigation and become unworkable.²⁵ However, this seems to be a poor reason for failure to examine alternatives. Although changes do tend to provoke litigation, we have courts to solve problems arising from legislative policy declarations.

The courts seldom give any reason for applying the Rule. When the cases do give a reason, it is usually that the Rule will encourage alienability of property.²⁶ The *Duke of Norfolk's Case*, which began the development of the Rule, presented this rationale,²⁷ and many commentators, including Gray, have supported it.²⁸ But as Professors Simes and Gulliver have indicated, most property subject to future interests is in trust and subject to a power of sale.²⁹ Consequently, the theory that the Rule prevents property from remaining out of commerce, and thus becoming stagnant, appears to be an unacceptable contemporary rationale.³⁰

A second reason given for the Rule is curtailment of deadhand control; the Rule is seen as an intent-defeating policy judgment that the dead ought not to control property ad infinitum.³¹ The Rule, of course, is intent defeating. Testators do not generally "intend" to run afoul of the Rule. But courts often ignore the Rule, and allow an extension of deadhand control that postpones the incidence of estate taxation and defeats other policies underlying the Rule.

D. Judicial Disregard for the Rule

A review of cases in the last decade indicates that courts often avoid the Rule, thus aggravating the problem of wealth accumulation.³² In some cases the courts are justified on orthodox grounds in

25. See Simes, *Is the Rule Against Perpetuities Doomed? The Wait and See Doctrine*, 52 MICH. L. REV. 179, 194 (1953).

26. See, e.g., *In re Lewis' Estate*, 37 A.2d 482 (Pa. 1944); *Rekdahl v. Long*, 407 S.W.2d 339 (Tex. Civ. App. 1966).

27. 22 Eng. Rep. 931 (Ch. 1682).

28. See J. GRAY, *THE RULE AGAINST PERPETUITIES* 297 (4th ed. 1942); R. LYNN, *THE MODERN RULE AGAINST PERPETUITIES* 9, 10 (1966).

29. See A. GULLIVER, *supra* note 15, at 20, 21; L. SIMES, *PUBLIC POLICY AND THE DEAD HAND* 40-41 (1955); Najarian, *Charitable Giving and the Rule Against Perpetuities*, 70 DICK. L. REV. 455, 457 (1966) (gifts to charity are normally securities which the trustee can sell).

30. L. SIMES, *supra* note 29, at 53. See A. GULLIVER, *supra* note 14, at 21. *But see*, Schuyler, *Should the Rule Against Perpetuities Discard Its Vest*, 56 MICH. L. REV. 683, 691 (1958).

31. A. GULLIVER, *supra* note 14, at 15; L. SIMES, *supra* note 29, at 58-59.

32. In addition to cases discussed in the text, several other cases indicate that courts may use construction and other devices either to avoid applying the Rule, or to avoid applying it to some interests. In *Breault v. Feigenholtz*, 358 F.2d 39 (7th Cir.

not applying the Rule.³³ But courts often seemed to strain, apply minority rules, or invent new doctrines to keep from applying the Rule. It is not surprising that cases calling for construction occur. Indeed, there are many future interest cases where no intention can be inferred, and where no rule of construction presents an inevitable solution.³⁴ In this gray area, courts are showing preference for the testator's "right to devise," and ignoring Gray's stern warning that the Rule is inexorable and intent defeating. The courts use of construction and other devices suggests a trend toward blatant judicial disregard for the Rule.³⁵

Perhaps the high water mark of this trend in recent cases is *In Re Estate of Chun Quan Yee Hop*.³⁶ There the court applied *cy pres* to validate a disposition it admitted violated the Rule. The testamentary disposition called for vesting trust corpus in sons or daughters of the testator, or the lawful issue of any deceased son or daughter, upon the death of the testator's wife or 30 years, whichever occurred last.

1966), the court, on questionable language, found a charity's interest was vested rather than contingent. Thus, some courts will force the interest into the vested or contingent category depending on the result deemed desirable. See L. SIMES, *FUTURE INTERESTS* 188 (1966). In *Second Nat'l Bank v. Harris Trust & Savings Bank*, 283 A.2d 226 (Conn. Super. Ct. 1971), the court played some similar verbal games. The court appeared to let the result turn on the formalism of the language, allowing the conditions precedent or subsequent to determine the validity of the gift. See also *Estate of Pearson*, 275 A.2d 336 (Pa. 1971) ("wait and see" applied); *Sellers v. Powers*, 426 S.W.2d 533 (Tex. 1968). Cf., *Estate of Kelly v. Patterson*, 193 So. 2d 575 (Miss. 1967), where the court applied the doctrine of equitable approximation to prevent the application of the rule against direct restraints on alienation.

Some cases, however, do apply the Rule without remorse to void interests. See, e.g., *Harrison v. People's Bank & Trust Co.*, 174 S.E.2d 867 (N.C. Ct. App. 1970); *Abram v. Wilson*, 220 N.E.2d 739 (Ohio P. Ct. 1966).

33. See, e.g., *Carroll v. Robinson*, 454 S.W.2d 329 (Ark. 1970); *Smyth v. Thomas*, 424 P.2d 498 (Kan. 1967); *Green v. Green*, 221 N.E.2d 388 (Ohio P. Ct. 1966).

In *Smyth v. Thomas*, the court's finding of no Rule violation appears correct, assuming, as the court did, that there was a definite failure of issue to be construed. The testator devised certain real property as follows: to wife Anna, for life, then to my son, Charles, for life, with remainder to the lawful issue of Charles born in wedlock who may survive him, provided that in the event Charles shall die without such issue, then the remainder to the children surviving both my daughters, Constance and Mae, per capita. All three mentioned children and his wife survived the testator. If the language, "in the event Charles shall die without such issue," had been interpreted as an indefinite failure of issue, a Rule violation would have occurred.

34. See Schuyler, *The Art of Interpretation in Future Interest Cases*, 17 VAND. L. REV. 1407, 1423 (1964).

35. Perhaps this is not a recent "trend," nor one confined to this side of the Atlantic. See Sweet, *The Monstrous Regiment of the Rule Against Perpetuities*, 18 JURIDICIAL REVIEW 132, 157 (1906) (whenever courts can decently do so they construe to avoid application of the Rule).

36. 469 P.2d 183 (Hawaii 1970). The court, citing prior cases, admitted construing around the Rule. The court cited one case where the testator designated 42 measuring lives in being. *Id.* at 185-86.

The court reformed the 30 years to 21 years and upheld the disposition. The court reasoned that judge-made rules were subject to judge-made nullification.

In *Will of Greenwood*,³⁷ the testator gave the residue of his estate to his daughter for life, then equally to five named grandchildren and one named great-granddaughter, "and any other great grandchildren." The court stated that the great-grandchildren class could include after-born great-grandchildren whenever born. The court admitted that if such afterborns were included in the class, there would be a violation of the Rule. But by utilizing a form of black magic called rules of construction, the court found no violation of the Rule. The court reasoned great-grandchildren meant the class of great-grandchildren living at the testator's death, but could "enlarge" to include afterborn great-grandchildren until death of the life tenant daughter. Therefore, great-grandchildren born after the death of the life tenant who might have had their interest vest beyond any life in being were construed out of existence. The class-closing rule was used to limit the class in a manner similar to that employed in *In re Wright's Estate*,³⁸ a case commonly used in future interests courses to illustrate the minority rule.³⁹

In *Industrial National Bank v. Barrett*,⁴⁰ the court, in a case of first impression in Rhode Island, aligned itself with the minority of U.S. courts to save a gift. In upholding a testamentary power of appointment and its exercise, the court determined its validity on the basis of the date of its exercise and not the date of its creation.⁴¹ The court referred to "logic" and obviation of technical harshness as sup-

37. 268 A.2d 867 (Del. 1970).

38. 131 A. 188 (Pa. 1925).

39. See A. GULLIVER, E. CLARK, L. LUSKY, & A. MURPHY, *GRATUITOUS TRANSFERS* 799-801 (1967); Casner, *Class Gifts to Others Than to "Heirs" or "Next of Kin" Increase in the Class Membership*, 51 HARV. L. REV. 254, 306-07 (1937) indicating that class closing is used as a technique of avoiding the Rule by a small number of courts.

40. 220 A.2d 517 (R.I. 1966).

41. Mr. Tilley predeceased his wife Mary M. Tilley and left her, among other things, a general testamentary power of appointment over a trust corpus remaining at her death. Mary's will exercised the power to a trust: income to her granddaughters Aline and Evelyn for life, then on the death of either granddaughter to pay income to her issue per stirpes, with power to pay principal to her said grandchildren or the issue of any deceased grandchild for certain purposes. Additional great-grandchildren were born after the death of Mr. Tilley and before the death of Mary Tilley. One great-grandchild was born after Mary's death.

One initial hurdle was the perpetuities savings clause which was arguably ineffective as a savings clause. The savings clause called for an end to the trust no later than 21 years after the death of the last survivor of the younger grandchild or the issue of either grandchild of the testatrix living at the testatrix' death.

The phrase, last survivor, could mean many things. It could mean that two great-grandchildren born after the death of Mr. Tilley could be living at Mary Tilley's death,

port for its decision. Some logic favors the court, other logic does not. What of the "logic" that the donee of a testamentary power cannot sell or dispose of the property during his lifetime? Coupling this rule with a new period from the death of the donee extends the permissible tying up of the property. One man's technical harshness is another man's circumvention of a rule against deadhand control.

Another example of judicial manipulation to save a gift from the Rule is the case of *West v. Storm*.⁴² The testator directed his trustees to deliver certain letters to various persons after his death as though "written today," and left certain instructions as to where he was to be buried and directions for an inscription on his mausoleum. He further specified payment of debts and taxes, and inartfully said that there would be no distribution under his will until the above directions had been followed. Ordinarily, the Rule is violated when distribution is delayed until payment of debts or probate of the will,⁴³ and it was argued that the letters might not be delivered within the period of the Rule.

There thus appeared to be a clear condition precedent, voiding the gifts. However, the court, using the magic of "interpretation," found that the testator meant for the letters to be delivered, and for the inscription to be made on the mausoleum, within the normal period of administration, similarly to the payment of debts. The court then found that by "distribution," the testator meant the payment of money to heirs or legatees, and not transfer of title to the trustees. Therefore, the court held the "distributions" to various persons constituted "postponement of enjoyment rather than a condition precedent to vesting."⁴⁴

The *West* court stated that its permissive interpretation of the Rule avoided intestacy, a delay in vesting, and forfeitures of interest, and that it protected residuary gifts to charity. These policies, the court noted, are "favored by the law."⁴⁵ It seems apparent from our analysis of wealth concentration that we ought to reexamine whether an unqualified right to devise should be a policy "favored by the law."

and one would not know which outlived the other until beyond 21 years after her death. Reading this back into Mr. Tilley's will, this would be an arguable violation. But the court took the view that the validity was judged from her exercise, and it therefore was valid. The court found "survivor" of the younger grandchild to mean one of her grandchildren's issue.

42. 217 N.E.2d 825 (Ill. Ct. App. 1966).

43. See Schuyler, *The Statute Concerning Perpetuities*, 65 NW. U.L. REV. 3, 16 (1970).

44. 217 N.E.2d at 828.

45. *Id.*

IV. REFORMING THE RULE

A. *The Direction of Previous Reform*

Proposals for reform of the Rule have been offered only on a very limited basis and have not questioned the underlying policy preferences of the Rule in favor of the rich and powerful. Actually, the "reform" is usually directed at allowing the rich to better carry out their intent to avoid tax and to control property in the distant future. The application of *cy pres*, advocated by some commentators and adopted by some courts,⁴⁶ would have this effect. Similarly, the "wait and see" principle will prevent the application of the Rule and immediate estate taxation.⁴⁷ It is important to realize that state legislatures and the courts can, by preventing the application of the orthodox Rule, defeat the policy of the federal estate tax.

Most attacks on the Rule assume that what the Rule attempts to do is basically sound, but address Rule results that are deemed unjust. Thus, Professor Leach's criticism goes to fertile octogenarians, precocious toddlers, administrative contingencies and the like. These are essentially situations where property goes to heirs or residuary legatees because the Rule operates to void a "remote" gift. Professor Simes would apparently agree that alienability arguments no longer support the Rule, but he rises in defense of the Rule as a happy compromise between control of property by the living and control by the dead. Another reform called a "rule of discrete invalidity" would avoid the "harshness" of an aspect of the common law Rule, going even further than "wait and see."⁴⁸ A few reformers have attacked the Rule on the basis of perpetuating deadhand control as such, presumably as opposed to control by the living.⁴⁹

When one observes the equanimity with which great capital wealth is perpetuated, viewing the problem only in terms of living versus deadhand control is a rather limited perspective. Broader questions need be asked. What claims do the dying, or the living for that matter, have to the control of excessive wealth? Does property have a social function? Is the concentration of wealth permitted by the

46. See Browder, *Construction, Reformation and the Rule Against Perpetuities*, 62 MICH. L. REV. 1 (1963) (New Hampshire and Mississippi have adopted *cy pres* by court decision).

47. *But see* Waterbury, *supra* note 2, at 82-84 (close analysis of tax results of "wait and see" indicates minimal revenue loss).

48. See Fletcher, *A Rule of Discrete Invalidity: Perpetuities Reform Without Waiting*, 20 STAN. L. REV. 459, 463 n.12 (1968).

49. See A. GULLIVER, E. CLARK, L. LUSKY & A. MURPHY, *GRATUITOUS TRANSFERS* 3 (1967).

existing superstructure of property law appropriate to a democratic society?

B. Using the Rule To Limit Wealth Concentration

Authorities on the Rule have developed different viewpoints on whether the Rule today should serve the purpose of preventing family capital concentration. Professor Leach has stated that the Rule need not further serve that function because the graduated income tax and estate tax are available to eliminate any threat to the public welfare from family dynasties built on great landed or capital wealth.⁵⁰ Professor Simes adds that any changes to further break up undue capital concentrations should come through tax legislation and not through changes in the Rule.⁵¹ Professor Waterbury's penetrating analysis of perpetuities reform also concludes that the issue of wealth concentration ought to be handled separately.⁵² Professor Gulliver sees well-to-do families as vanishing in America, but notes the Rule could serve as a mild private antitrust law. He suggests that outright ownership might lead to capital dissipation.⁵³ Professor Lynn observes that insofar as the Rule attempted to prevent family dynasties, it has been a signal failure.⁵⁴ No one seems to argue that the Rule itself, without an accompanying tax structure, has prevented or could prevent capital concentration. Indeed, one historical function of the Rule was to increase the subjection of estates to taxation.

The suggestion that a traditional function of the Rule can be overlooked because taxes have prevented concentrations of wealth in family dynasties deserves, to say the least, further scrutiny. Leach's view that most aspects of powers of appointment should not be taxed has been criticized by Dean Griswold as showing a bias toward tax avoidance. He suggests property lawyers say "[we're] pretty well entrenched, and we think we'll stay here until we're driven out."⁵⁵ Replying to the assertion that the tax has eliminated the empire builders, another commentator has asked, from whence do empire builders come?⁵⁶ In fact, the particular compromise of the Rule and its death tax consequences first favored the landed gentry, and later the industrial managerial aristocracy. The development of the Rule after the in-

50. Leach, *supra* note 22, at 727.

51. L. SIMES, *supra* note 29, at 57.

52. Waterbury, *supra* note 2, at 50-51.

53. A. GULLIVER, *supra* note 14, at 16.

54. R. LYNN, *supra* note 6, at 9-10.

55. Griswold, *Powers of Appointment and the Federal Estate Tax, In Reply*, 52 HARV. L. REV. 929, 967 (1939).

56. Waterbury, *supra* note 2, at 45.

dustrial revolution reflected attempts of the landed gentry to escape the impact of the industrial revolution and the consequential rise of the commercial classes.⁵⁷ The prevailing interpretation of the Rule was extended to personalty, thus allowing future interests in new wealth forms for at least one generation. This development was instrumental in maintaining the American industrial aristocracy.⁵⁸ The tendency of accumulated wealth to continue its hegemony by escaping taxation is the current stage in the development of attempts to exploit the permissiveness of the Rule.⁵⁹

Practically anything a testator desires to do can be done within the Rule.⁶⁰ Sophisticated testators can avoid estate taxes, not only for possibly 80-100 years before the Rule applies, but also until the death of the remainderman, perhaps some 50 years later.⁶¹ Courts applying the Rule thus fail to protect the public welfare from the predatory rich while imposing forfeitures on others because of bad draftsmanship.⁶² Subjecting a disposition to the Rule may mean a gift will fail. It then often goes to heirs or residuary legatees instead of remote beneficiaries. In any event, application of the Rule eliminates some future interests, so the gift may be subject to tax upon the next transfer. It may be asked, whom does the Rule catch? Perhaps it does not catch those lawyers sufficiently specialized to be cognizant of the Rule. If so, the Rule further encourages wealth concentration, since the rich can buy the expertise to avoid the Rule's impact.⁶³

Adjusting the Rule to curtail or eliminate the use of future interests may possibly be the best vehicle by which to avoid wealth concentration. Historically the purposes of the Rule and the estate tax have been coordinated and interconnected. Efforts to restrict the use of future interests were directed both toward breaking up capital concentration and toward a more frequent imposition of tax. Closing the Rule period today, and thus curtailing the use of future interests, would have the same objectives as these efforts did in the Middle Ages. Elimination of the tax incentive for using multigeneration trusts would achieve the same results. Moreover, the use of tax policy to

57. See 4A G. THOMPSON, REAL PROPERTY § 2013 (1961, Supp. 1972).

58. *Id.*

59. Cf. Note, *Power and Probability of Alienation and the Scope of Judicial Control over Actual Alienation*, 27 COLUM. L. REV. 959, 968 (1927).

60. See W. LEACH & O. TUDOR, *supra* note 17, at 24.

61. See *In re Chun Quan Yee Hop*, 469 P.2d 183 (Hawaii 1970), where the court indicated the testator's trust could legally run a century or more; Young, *Proposed Revisions of the Federal Estate and Gift Tax Laws, The ALI Revisited*, 5 GA. L. REV. 75, 86 (1970).

62. See Leach, *supra* note 22, at 723.

63. Cf. Bale, *supra* note 12, at 138.

clamp down on the generation-skipping trust would lessen the use of future interests and would minimize other undesirable policy consequences of the existing, permissive Rule.

V. SUGGESTIONS FOR REFORM

A. *Taxing Successive Transfers*

Generation-skipping trusts offer a significant subsidy to the rich. A testamentary transfer in trust from *A* to trustee, income to children for life, then to the grandchildren, spans generations without imposition of a federal estate tax. The absence of data in the past has left us in the dark as to how often and by whom future interests are used to avoid taxation. However, one recent study has analyzed estate tax returns from 1957-59. The findings are immensely significant. The study defines a generation-skipping trust as one in which, e.g., the property passes from children to grandchildren without imposition of estate tax. It does not include a transfer to wife, then corpus to children, though the transfer to children occurs without an imposition of estate tax.⁶⁴ If the study had focused on the property passed through this device to the first generation (children of the testator) the results might have been even more dramatic.

The study helps explode the myth that taxation of successive transfers would fall primarily on poor widows and orphans. Taxation of successive transfers would primarily reach the millionaire, rather than the person of moderate means. The study disclosed that in gross estates under \$300,000, very little use of trusts is made, and that most of the property bequeathed in trust will be taxed again in the estates of the settlor's children.⁶⁵ In gross estates of \$300,000 to \$1 million, and especially in gross estates greater than \$1 million, trust use is much greater.⁶⁶ About \$1 billion was placed in generation-skipping family trusts in these two years. The legatees, spouses, children and grandchildren received more than \$10 billion in outright bequests during this period. Considering just the millionaire group, millionaire widows bequeathed nearly two-thirds as much property in generation-skipping family trusts as they did outright to their families. Millionaire divorcees bequeathed more property in generation-skipping family trusts than they did in outright legacies.⁶⁷ Thus, decedents with gross estates over \$1 million frequently bequeathed property in generation-skipping family trusts to distant descendants with income to inter-

64. G. JANTSCHER, TRUSTS AND ESTATE TAXATION 57-59 (1967).

65. *Id.* at 157.

66. *Id.* at 118-20.

67. *Id.* at 128-29.

vening generations.⁶⁸ However, even among decedents most likely to use generation-skipping trusts, the majority did not use this device.⁶⁹

The English appear to have adopted the approach of eliminating generation skipping as a tax avoidance tool.⁷⁰ The problem of equalizing taxation of outright bequests and bequests by future interest is somewhat separable from ideology; its basis is a kind of equal protection. But taxation of outright bequests and future interest trusts on a similar basis has proved extremely difficult.⁷¹ The American Law Institute has made tax equalization proposals to the House Ways and Means Committee.⁷² Legislation on the matter has not been forthcoming. The Treasury has made stricter and better proposals, which would go further in treating outright transfers and generation-skipping transfers similarly.⁷³

I recommend a joint approach: elimination of the tax advantages of successive transfers, and formulation of a Federal Rule against Perpetuities that will make for uniformity in tax policy. Both measures are necessary because curtailment of future interests alone would only ensure that someone will have the property in possession at some closer point in the future; if the recipient squanders the property, it will go untaxed. Of course, if the tax policy were tightened to the maximum remote use of future interests might become a dead letter, since the millionaire group uses it, at least in significant part, to avoid taxation.

B. A Federal Rule Against Perpetuities

Professor Waterbury's argument in favor of the existing Rule is typical and deserves attention.⁷⁴ He says a testator should be able to

68. *Id.* at 157.

69. *Id.*

70. *Id.* at 162-66.

71. See Bale, *supra* note 12, at 135, suggesting that no tax system has adequately been able to deal with the problem of generation skipping. Discretionary twists are a leading escape hatch here. Waterbury, *supra* note 2, at 50-51, n.44. Waterbury concludes achieving equality between outright bequests and successive estates is difficult. For example, if the remainderman predeceases the life tenant, English law, which apparently taxes the whole estate in the remainderman's estate and also on the subsequent death of the life tenant, imposes a greater tax than if the property were passed outright. It would have been taxed only once in the latter situation—upon the death of the outright bequest recipient (the life tenant). Waterbury, nonetheless, favors eliminating the present advantage of successive remainder estates over outright bequests as the lesser of the evils.

72. See Young, *supra* note 61, at 75. For A.L.I. original proposals, see A.L.I. FED. ESTATE AND GIFT TAXATION §§ X41-43, App. B at 351-410 (1969). The proposed legislation approximates equality of taxation on transfers. For an alternative plan, see G. JANTSCHER, *supra* note 64, at 172-90.

73. See Young, *supra* note 61, at 88.

74. See Waterbury, *supra* note 2.

provide in trust for his wife and minor or inexperienced children, with something left over for future generations. Assuming *arguendo* that such trusts should be permissible, does that argument extend to adult children, grandsons, nephews, grandnephews, strangers, etc.? Where does one draw the line as to how many future generations and how much wealth devolution one permits?

Waterbury's conclusion that no vital public interest appears at stake and that testamentary transfers are purely a matter between the testator and his heirs requires examination. The community has a vital interest in the fact that concentrations of wealth by inheritance give some persons advantages over others, a fact not easily reconcilable with a democratic philosophy. It is not unreasonable, however, that spouses and minor children be permitted a reasonable inheritance.

Another objection to closing the Rule period is that it is "practically impossible" to change the perpetuities law of the state jurisdictions. Professor Waterbury points to the probability that actions curtailing inheritance in some states would merely result in a flow of wealth to states that retained the current policy toward inheritance. A Federal Rule against Perpetuities could be devised that would obviate this "practical impossibility" and lack of uniformity. The Federal Rule could be constitutionally tied to taxing powers of the federal government. Alternatively, the federal estate tax credit for state death taxes could be conditioned upon state enactment of a model Rule.

The Federal Rule might continue the common law rule except as hereinafter modified:

No interest is good unless it (1) must vest in possession, rather than interest, not later than 21 years after some life in being at the creation of the interest, and (2) must vest in possession, if at all, within 50 years from the creation of the interest.

A model for the second clause is provided by an Illinois statute restricting the possibility of reverter and right of entry to 40 years from the date of creation.⁷⁵ The Illinois experience suggests the feasibility of extending that approach to other types of future interests. However, the 50-year term of the Federal Rule should be progressively shortened as the effect of the new Rule is analyzed.

The Federal Rule suggested here is related to prior proposals. Professor Waterbury has proposed a restriction of the common law rule to require vesting in possession, free of trust and in absolute ownership, at the expiration of the perpetuities period. He would also extend the period in gross to 30 years. Professor Simes also discusses

75. ILL. REV. STAT. ch. 30, §§ 37b-h (1973). Since rights of entry and possibilities of

the possibility of having a future interest vest in possession in the period of the Rule. These in themselves represent minimal, but nevertheless desirable, reforms. They should be considered if the proposed Federal Rule is not politically feasible at this time.

In considering future interest reforms, we should consider the pattern future interests have taken in developed civil law countries. Future estates in land and personalty were curtailed in France after the Revolution. Such curtailment may redistribute wealth and accomplish other desirable policy results. For example, curtailment of future interests increases marketability of land, since future interests impede the power of any one person to convey the fee.

In the United States, the presence of future interest fetters on land still presents a policy problem; interests such as vested remainders, reverters, and rights of entry involve possibly irrational land use policy. Our courts can presently order the sale of land and substitution of a fund for the future interest holder. This allows the fee holder to convey a fee despite a future interest, but this is apparently done only under limited circumstances, as when the sale is necessary to make mortgage payments to prevent forfeiture of the improvements. Some have said there is no excuse for having rights of entry and possibilities of reverter exempt from the Rule.⁷⁶ My recommendation is that these future interests be exempt from any Federal Rule. A time limitation, such as that in Illinois, should be placed on these interests by separate legislation.

C. Standing To Challenge Rule Violations

Rule violations can be challenged in court only if the persons or institutions involved in the controversy activate the issue. Probably many cases of Rule avoidance are settled before reaching the courts. Presumably, ignorance of violations prevents many challenges. Additionally, parties may be reluctant to press Rule violations because they might create disharmony in a family unit.

The state has a genuine interest in preventing Rule avoidance. It suffers a financial loss when the avoidance of the orthodox Rule results in a loss of estate tax revenue. Because of the state's strong interest in wealth devolution, state agencies, such as the Treasury, should have standing to litigate Rule violations.

reverter have not been subject to the Rule in this country, the Illinois approach limiting those interests would seem preferable. There is the further advantage of experience under that approach and the knowledge that the world has continued to revolve on its axis.

76. See, e.g., E. RABIN, *FUNDAMENTALS OF REAL PROPERTY LAW* 217 (1974); Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land*, 54 HARV. L. REV. 248 (1940) (calling for states to abolish the remedy by forfeiture).

D. Estate and Gift Tax Reform

It is beyond the scope of this article to deal fully with estate planning methods for avoiding estate and gift tax. But the problems created by those methods are clear. Lifetime gifts of insurance, for example, can be made without gift or estate taxes on the transfer to the beneficiary upon the death of the insured.⁷⁷ The gift tax is based on the replacement value of the policy at the time of the gift, rather than the policy's face value. If the cash value is small at the time of the transfer, for a small gift tax the donor may be able to pass unlimited amounts of life insurance at his death without incurring estate taxes.⁷⁸ Furthermore, future interests and trusts can be used to transfer proceeds to the issue of a son or daughter, allowing the sum to escape the tax a second time as it passes from one generation to another.

Insurance on the life of another, particularly when coupled with a generation-skipping or "grandfather" trust, presents attractive tax avoidance techniques. Flexibility can be obtained with generation skipping through the device of a tax-free special power of appointment. Essentially, the technique calls for insurance, perhaps on the son's life, payable at his death to such of his children as he appoints.

While the estate tax avoided through multigeneration trusts is significant, it is not the only problem that exists. A full scale overhaul of the rates and avoidance techniques related to the estate and gift tax is needed. For example, Professor Bittker has recommended that the \$60,000 estate tax exemption be lowered to \$25,000, coupled with a "dependency exemption." He would increase rates applicable after the exemption to 25 percent, rising to 50 or 60 percent at the \$1 million level, and continuing upward to a final marginal rate of 80 percent at the \$15 million level.⁷⁹ These approaches represent a good starting point, although experience might lead to further rate adjustment.

Still another problem is the stepped-up basis given an heir on appreciated property. This is a great advantage to holders of stock

77. See C. LOWNDES & R. KRAMER, *FEDERAL ESTATE AND GIFT TAX* 792-95 (2d Ed. 1962) To achieve this one must not leave a possible reversion, and some gift taxes may be incurred along the way.

78. *Id.* at 795-801. The donor can avoid payment of gift taxes by purchasing a form of insurance that has a sufficiently low premium to be less than the annual exclusion of § 2503(b) of the Internal Revenue Code. *Id.*

79. See Bittker, *Federal Estate Tax Reform: Exemptions and Rates*, 57 A.B.A.J. 236, 239-240 (1971). The "dependency exemption" would result ordinarily in no greater tax liability for two-thirds of the returns filed, (e.g., \$150,000 or less) if the decedent is survived by young children or other persons qualifying for the dependency exemption. The tax burden would rise, however, for decedents not survived by a spouse or minor children, as well as for larger estates. *Id.* at 240.

that has risen in value. Congress has received bills attempting to deal with this loophole, which has been estimated to pass \$15 billion yearly in capital gains outside the income tax system.⁸⁰ None has yet passed.

Other means of avoidance particularly attractive to some are annuities,⁸¹ gifts to minors,⁸² and use of the marital deduction.⁸³ Bargain rates for gifts should be abolished by applying the same tax rates to estates and gifts.⁸⁴ All other gratuitous transfers, by whatever device, should be taxed in some manner.⁸⁵

VI. OTHER CONSIDERATIONS IN CURTAILING INHERITANCE

So far I have suggested that wealth concentrations should be broken up, and have offered some specific proposals that would accomplish this by changes in the law of inheritance and the estate and gift tax scheme. It is now appropriate to discuss the possible long-range ramifications of such action. Attention will be focused on those arguments most frequently offered in opposition to a tightening of the inheritance laws.

A. The Effect on Trust Funds

Applying a stricter Rule against Perpetuities to property held in private trusts raises issues involving investment capital, risk capital, and the trustees' investment policies. Also involved is the question of who shall control property—the dead or the living. While most of the property subject to future interests today is personalty subject to the trustee's power to sell, the standards governing investment of trust property are conservative and may favor established interests.

Professor Simes points out that funds held in trust tend to be eliminated from use as risk or venture capital.⁸⁶ Moreover, if funds were distributed directly, the recipients could buy consumer goods. Trustees, however, can only engage in capital investments, such as purchases of bonds, mortgages, and stocks. Professor Simes states that

80. See, e.g., Young, *supra* note 61, at 91, 93.

81. See C. LOWNDES & R. KRAMER, *supra* note 77, at 802-07.

82. See *id.* at 812-816.

83. See *id.* at 816.

84. See Bittker, Book Review, 56 YALE L.J. 1286, 1290 (1947), discussing unwarranted disparity in tax between *intervivos* and testamentary transfers.

85. McDougal, *Future Interest Restated: Tradition vs. Clarification and Reform*, 55 HARV. L. REV. 1114 n.57 (1952).

86. L. SIMES, *supra* note 29, at 60-61. The restriction on venture capital is another reason why the Rule is too permissive. See Downing, *The Duration and Indestructibility of Private Trusts*, 16 CASE W. RES. L. REV., 350, 365-68 (1965).

in time of economic depression and individual misfortune it may be socially undesirable to freeze too much of the world's wealth in the form of capital. The Rule against Perpetuities, he concludes, tends to prevent a long-continued freezing of capital. Tax policies discouraging the use of future interests would accomplish the same end.

In defense of the current Rule period Professor Simes has argued that accumulations of capital and income resulting from a lengthy trust are desirable in that savings are necessary for the economy. He analogizes this argument to the economic theory of foregoing current consumption in order that savings can be accumulated and converted to "capital." But the withdrawal of huge sums into trust "savings" could result in having too little available for consumption purchases in the short run.⁸⁷

Professor Simes concludes: "Whether one should favor a free economy in which to determine how much savings should be made; or whether the legislation of a managed economy should broaden the base of expenditures for consumers' goods, is not our problem."⁸⁸ But savings, investments, and funds available for consumer expenditures are constantly affected by governmental actions—witness tax cuts, wage and price guidelines, and international currency exchange rates. Simes does not explain why he thinks broader economic concerns are irrelevant. He defines the problem simply as one of deadhand control versus control by the living, and by so defining the issue, eliminates the social and economic responsibility of this Rule. Why should social and economic consequences of the Rule stop at deadhand control? Fulfilling the social goals of lessening wealth concentration and keeping property unfettered is more important than the mere determination of rights between individuals.⁸⁹

B. Individual Rights and Incentive

Some have argued that inheritance is a "natural right" not subject to the power of the state, but this is not supported by history. At early common law there was no inheritance.⁹⁰ On a broader scale a "natural right of inheritance" can be countered by a natural, democratic right of the public to equality of opportunity and enhancement of human dignity otherwise curtailed by excessive inheritance and capital concentration. If unqualified rights of property ever existed, they are

87. See Woolfson, *supra* note 2, at 375 (too much saving can produce deficiency of funds for consumption, hurting economy).

88. L. SIMES, *supra* note 29, at 99.

89. See Downing, *supra* note 86, at 362.

90. See W. SCHULTZ, *THE TAXATION OF INHERITANCE* 173 (1926).

now commonly curtailed in the public interest. Moreover, Jefferson's lofty concept is apposite: "The earth belongs in usufruct to the living; the dead have neither powers nor rights over it."⁹¹

One argument used to support the "natural right" to inheritance is that it is "indispensable to the development of families."⁹² Briefly, it may be answered that wealth also destroys families, as when they fight over who gets what. It is also maintained that inherited wealth allows some to pursue useful lives in science, the arts and public life without having to seek gain therein.⁹³ While this may be true in some instances, it is equally true that those with large accumulations may use public life to further or maintain their own class positions rather than to make contributions to society.

Another, more pragmatic, argument is that reducing private control over inheritance would discourage incentive.⁹⁴ One question is, whose incentive? Would the incentive of those "disenfranchised" by the present system be as discouraged if they had an equal opportunity? Do we know why managers and business persons devote such time and energy to property acquisition? Is their motivation significantly related to the control of wealth for successive generations?⁹⁵ Some classical economists maintained that man amasses wealth to create family fortunes, and that he will lose interest and ambition if thwarted.⁹⁶ It can logically be argued that nearly the reverse is true—that the challenge and difficulty of succeeding in a given enterprise is the primary motivation for undertaking and continuing the struggle.⁹⁷ The real motivator may be accomplishment or achievement for its own sake and for short-term rewards.

In the 1930's the incentive issue was raised during hearings on

91. Quoted in *id.*

92. *Id.* at 197.

93. *Id.*

94. Tax policies may lead to a destruction of wealth so that none is available for redistribution. See Phillips, *Social Control Through Taxation of Estates and Trusts*, 23 CORNELL L.Q. 113, 114-15 (1937).

95. See A. CHANDLER, JR. & S. SALSURY, *PIERRE S. DUPONT AND THE MAKING OF THE MODERN CORPORATION* 563 (1971). DuPont, who in 1924 had substantial interest in DuPont and General Motors, made transfers during life to avoid an increase in tax from 25 percent to 40 percent on estates over \$10 million. "I [DuPont] often wonder why so many people hang on to their fortune and property instead of having the fun of watching the distribution processes themselves.' Since the tax laws [give] no incentive to accumulate, 'why not enjoy the dissociation processes. I have had much more satisfaction in planning for roads, schools and hospitals, etc. than in continuing the piling up process . . .'" *Id.* He did not like the inheritance tax law, and he probably would not have enjoyed the "dissociation" process if faced with a heavy gift tax.

96. W. SCHULTZ, *supra* note 90, at 169.

97. Cf. Boehm, *Cause and Effect: Federal Estate Tax Revision Tied by Law to Social Consequences*, 41 TEX L. REV. 479, 486 n.28 (1965).

inheritance tax legislation. Senator Tom Connally criticized accretions to private capital unassociated with management—the absentee industrialist, as it were. He favored taxation to prevent the Ford family from entailing property through the generations, apparently viewing taxation as a method of redistributing wealth.⁹⁸ In rebuttal, Treasury Secretary Mills suggested increased taxation would inhibit potential Henry Fords.⁹⁹ But one commentator who studied the rise of the first industrial entrepreneurs in England singled out an “urge to activity,” apparently unassociated with acquisitiveness, as an important characteristic of the early entrepreneur.¹⁰⁰ Andrew Carnegie felt that captains of industry did not accumulate so much for their posterity as for the joy of the struggle of accumulation.¹⁰¹ Furthermore, many persons in higher income brackets are not immune from the Protestant Ethic which requires work for secular or religious salvation. Studies have also shown that neither individual effort nor economic growth has been inhibited by the presence of a tax.¹⁰² It can also be argued that the curtailing-of-incentive position would be more applicable to income tax increases than to reductions in inherited wealth.

Moreover, is incentive, if that is the issue, the only important social

98. R. PAUL, *TAXATION IN THE UNITED STATES* 158-59 (1954). Historically, two contentions have been offered concerning wealth: failing to control the concentration of wealth would be the downfall of capitalism; and control of wealth would be its downfall. See *id.* at 152, 158, 178. In 1932, Congressman LaGuardia testified that a purpose of income and estate tax was to prevent undue concentration of wealth. He listed a number of persons with estates running over \$200 million. Secretary of the Treasury Ogden Mills thought estate taxation would cripple the system, by “destroying working capital.” He preferred semi-public corporations with a fixed return. *Id.* at 159. Representative Pettengill of Indiana urged higher estate taxes for the “survival of capitalism,” noting that increased rates in Great Britain had not unduly discouraged thrift or accumulation and concentration of wealth had dried up purchasing power. In 1953, he reversed himself, taking the view that progressive taxation would make the state the sole source of capital, credit and payrolls, master of the fate of all.

99. *Id.* at 159.

100. J.W. GOUGH, *THE RISE OF THE ENTREPRENEUR* 290 (1969).

101. See W. SCHULTZ, *supra* note 90, at 196-97; A. HUTCHINSON, *THE LIMITS OF WEALTH* 272-74 (1907).

102. See Cooper, *Taxation and Incentive in Mobilization*, in *READINGS IN THE ECONOMICS OF TAXATION* 470, 472, 477, 490-91 (R. Musgrove & C. Shoup ed. 1959). The author suggests that a conclusion that increased income tax reduces incentive is a myth—subject to some qualifications. See Fiekowsky, *The Effect on Saving of the United States Estate and Gift Tax*, Appendix F in SHOUP, *FEDERAL ESTATE AND GIFT TAXES*, 228, 234-35 (1966), who asserts there is no indication that estate accumulators have become discouraged by high rates of death tax. The evidence is somewhat indirect, as perhaps it must be. The author argues: (1) efforts to avoid tax by generation-skipping trusts and gifts have not increased; (2) the number of estates around the exemption level would have increased as holders of larger estates failed to accumulate because of the tax. For those interested in further study of economic approaches to incentive and taxation, see *Bibliography*, *READINGS IN THE ECONOMICS OF TAXATION*, *supra*, at 555-56.

goal? Why should the legal system provide an "operational headstart" to individuals who already occupy a superior position in society?¹⁰³ Why protect a second or third generation coupon clipper whose wealth is unrelated to his own efforts?¹⁰⁴ Prevailing inheritance structures conflict with the fundamental democratic notion of equal opportunity.¹⁰⁵ Wealth is the product of the community as well as the individual, and the community properly claims its share through taxation. The state may be viewed as the silent partner of wealth acquisition, so that when the citizen partner dies, the silent partner should share in the capital.¹⁰⁶ While such a proration may be difficult,¹⁰⁷ so are other divisions which the law makes. To a significant degree the present distribution merely proceeds from an antecedent distribution of wealth whose sacredness and legitimacy are at least subject to question.

C. Effect on the Performance of Corporations

One possibly disturbing feature of tightening inheritance is the potential effect on performance of corporations. One study indicates that corporations run by owners (owning around 20 percent of the stock) are better performers than management operated firms.¹⁰⁸ The suggestion is that managers seek maximization of their own earnings, which may not be coincident with corporate profit maximization.¹⁰⁹ Similarly, Professor Galbraith has suggested that corporation managers may seek to extend their own spheres of control rather than maximize profit. Some question may remain as to whether breaking up the ownership pattern would affect firm performance.

A significant number of the largest 200 non-financial corporations,

103. See J. GALBRAITH, *THE AFFLUENT SOCIETY* 39 (1959); G. JANTSCHER, *supra* note 64, at 158 (accidents of birth should not favor the few in a competition for wealth and position that ought to be based on talent and initiative); W. SCHULTZ, *supra* note 90, at 167-68. Professor Galbraith also notes that discussions of fortuitous devolution of wealth are often muted by those who might be subjected to an equalization process. J. GALBRAITH, *supra*.

104. See F.D. Roosevelt, Message to the Congress of the United States, 79 CONG. REC. 9658 (1935) (quoting President Theodore Roosevelt). Both Presidents Roosevelt felt that a progressive tax on large fortunes preserves equality of opportunity for younger generations.

105. See Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 253 (1943) (future interests as presently constituted lead to over-concentration of wealth inconsistent with basic democratic values).

106. See W. SHULTZ, *supra* note 90, at 181-82.

107. *Id.*

108. See Monsen, Chiu & Cooley, *The Effect of Separation of Ownership and Control on the Performance of the Large Firm*, 82 QUARTERLY J. OF EC. 435, 442 (1968).

109. *Id.*

however, are controlled by management, not owners.¹¹⁰ In 1963, five of the largest 200 firms were controlled by families through key offices in the corporation rather than through stock ownership.¹¹¹ One study suggested that many large firms have reached a size so great that their control is beyond the financial means of an individual.¹¹² With respect to these firms, tightening inheritance would have little effect on performance; the traditional owner has already been displaced.

D. Taxing More of the Inherited Wealth

A primary objective of the proposals offered in this article is to make more of the concentrated wealth subject to inheritance taxation. Although the purpose is not primarily to create revenue, but to reduce concentrations of wealth, the mechanism is the same. Some of the opposition to a tightening of the inheritance law concerns discontent with this type of taxation.

Numerous arguments have been posed in opposition to an inheritance tax. Adam Smith pointed out a potential inequity in that fortuitous deaths may subject some families' property to more frequent taxation than other families' property. He also argued that the inheritance tax "diminish[ed] the funds destined for the maintenance of productive labor."¹¹³ The latter argument, if valid, could be leveled at other governmental taxes also. The state has assumed the power to tax, and been upheld in doing so, on the theory that the state creates inheritance rights and what the state creates it can take.¹¹⁴ It has also been argued that inheritance violates a "property right" of the living, since a devise is a postponed gift, and limiting inter vivos gifts would presumably also contravene a property right.¹¹⁵ An answer is that gifts have in fact been limited by the gift tax, and otherwise.

An inheritance tax can be viewed as a quid pro quo for protection of property. An expansion of the tax could thus be justified on the basis that greater protection is required for larger amounts of property. Heightened protection of large property holdings is exemplified by government intervention to forestall foreign expropriation, or legislation that conditions foreign or military aid upon nonconfiscatory domestic policies of the recipient.¹¹⁶

110. Lerner, *Ownership and Control in the 200 Largest Nonfinancial Corporations, 1929 and 1963*, 56 AM. EC. REV. 777, 781 (1966).

111. *Id.* at 785.

112. *Id.* at 786.

113. A. SMITH, *WEALTH OF NATIONS* 380 (Great Books ed. 1952).

114. *See* W. SCHULTZ, *supra* note 90, at 176.

115. *See id.* at 169.

116. *See id.* at 181.

Perhaps one could stress the validity of a capital levy per se, and see the inheritance tax as a convenient administrative device to collect it. Treatment of the inheritance tax as a delayed *capital tax* has been criticized. Schultz contends that such a theory does not explain inclusion of an exemption schedule based on the closeness of the relationship to the decedent. Although consistency is a desirable attribute of a tax system, many of our taxes have built-in preferences for various groups. While these should be scrutinized, nothing precludes tax policy from providing special considerations. Schultz also argues that this is a double imposition of the same tax, since there is already an income tax.¹¹⁷ However, the income tax reaches accumulated capital only indirectly, and among the wealthiest the income tax is subject to such manipulation that not only capital, but also income, often remain untaxed. The answer may be to amend the income tax, but incentive is more likely to be reduced as a result of increases in the taxation of income than by changes in the inheritance tax.

On the other hand, some economists have defended the inheritance tax as a deferred capital tax. The argument here is that the fairer tax is one on savings. If that is the case, the income tax is less desirable than the inheritance tax because the income tax takes from the poor a greater portion of potential savings than from the rich. The inheritance tax is regarded as preferable to a direct tax on savings because it may accomplish the result without unduly discouraging thrift. Schultz reports, however that economists seldom have agreed that focusing on taxation of savings is desirable.¹¹⁸

Another view in favor of the inheritance tax is that it can remedy the failure of other taxes to produce "tax equality." Other taxes, goes the argument, are often regressive but inheritance taxation can equalize the tax burden.¹¹⁹

Much inheritance tax analysis has focused on the decedent and not on the beneficiary. If the focus is shifted, one must ask whether beneficiaries already in privileged economic conditions should pay more tax than those who are not. The Soviet system applies a means test to inheritance—those needing inheritance are favored over those who do not. How could such "deep pocket ability" be measured in our system? Some theorists advocate treating inheritance proceeds as a form of income to be added to the income tax return.¹²⁰ Such approaches rest on the theory that progressive rates should be imposed on

117. For Mr. Schultz' analysis, see *id.* at 185-86.

118. *Id.* at 185-86.

119. *Id.* at 186.

120. *Id.* at 188.

high-income beneficiaries because they have greater protection from the tax bite than others with less income.¹²¹

Still another approach is that of socialist theorists. The thrust here is not an argument couched in terms of economic efficiency, but a rejection of such analysis as irrelevant. The reasoning is that history is explained by class conflict and that tax legislation is class oriented. Schultz spells out the history of the inheritance tax as a means for the class in power to adopt taxation systems that favor itself at the expense of other classes. In England, the landowning class at first discriminated against the industrial and commercial classes. Later the industrial and commercial classes gained power and discriminated against the landowners.¹²² This parallels the history previously discussed, wherein the permissiveness of the Rule was first the instrument of the landowning class, but later was co-opted by the industrial and commercial classes and applied to personalty as a means of maintaining their position.¹²³

There may be other means of attacking the problem of concentrated wealth. The income tax has already been mentioned. But few taxes, income or otherwise, deplete existing personalty and realty as effectively as a capital tax. Some states levy an intangible property, or solvent credits tax. This tax is often defeated by concealment and tends to be unenforced, but there could be a properly administered annual *wealth tax*. It is argued that such a tax would strike at the conservers of wealth, rather than earners of income, and if substituted for the income tax at higher levels might promote growth and efficiency. A wealth tax would also eliminate the problem that some wealth is accumulated and spent and is therefore unavailable for taxation at death. The result could compel the productive use of capital and avoid the forms of accumulation in which capital is often conservatively invested. Perhaps the annual wealth tax should be coupled with the estate tax, as is the case in Germany and Sweden.¹²⁴

E. Government as the Redistributor

Another concern is that even if concentrations of wealth can be reduced by greater taxation, the government itself will defeat this effort by returning this revenue to the same powerful and wealthy

121. *Id.*

122. *Id.* at 190-95. Schultz finds that to describe nineteenth century inheritance tax struggles solely as class conflict would be an exaggeration; to neglect that feature would make an analysis decidedly incomplete. *Id.* at 192.

123. See pp. 37-40 *supra*.

124. See Bale, *supra* note 12, at 123.

segment of the population or by wastefully, or corruptly, using the tax revenue.

Schultz points out that if more wealth were to escheat to the state, revenue would be greatly increased. A significant number of payments would have to be made in kind, and land and business property would then be socially owned.¹²⁵ This was perhaps the accelerated effect of the revolutions in the U.S.S.R. and Yugoslavia. It is possible that there would be a shift from the present economy of concentrated private wealth to an economy of concentrated public wealth managed by persons composing a state or public bureaucracy.

This possibility raises concerns as to whether it is desirable to use the government, over which the rich and powerful have substantial control, as the vehicle for wealth redistribution. The answer to such concerns lies in the belief or hope that citizens will utilize the democratic process to make the state responsible. Measures to achieve such responsibility are outside the scope of this article, but would involve such things as strong, and seriously enforced, financial disclosure laws; conflict of interest restrictions; public financing of political campaigns; and improved access to government functions. Redistribution subject to such checks and pressures would indeed reduce the vulnerability of government and governmental officials to control by those who hold most of this country's wealth. It is at least possible that wealth and power could be redistributed to those presently "disenfranchised," and that democratic controls could be maintained and exercised.

At present, only minimal controls are exercised over the private oligarchy that runs this country's enterprises. The situation could be no worse if wealth were held by government, which is subject to at least some checks. Unless the political process alters the distribution of wealth, wealth and power will become more concentrated. Aggregating wealth in the state is not a cure-all, but it is an initial step that must be taken.

VII. CONCLUSION

The large concentrations of privately held wealth in the United States continue to be a threat to the principles of a democratic country. A great potential for remedying this imbalance exists within the legal community. This article has suggested reforms related to the Rule against Perpetuities and the estate tax structure that could do much to reduce such concentrations of wealth and power.

125. W. SCHULTZ, *supra* note 90, at 198.

Concentrated wealth has historically avoided legal instruments designed to reach it. Many capable and ingenious minds are directed to this end; it will take equally ingenious minds to end the cycle.

We can rest assured that entrenched capital will not lightly accept a shift to a more equal allocation of resources. Property may take on new forms or utilize old forms to escape taxation and prevent implementation of democratic goals embodied in the notion that property exists to serve human needs. Traditional doctrines and policy are often unable to keep pace with changing forms. It is time to take additional steps to close this gap.

Any revolution in curtailing inheritance will probably come about slowly and will be characterized by power struggles at every turn. Perhaps it will be carried on in much the same manner as other controversial reforms today, such as restrictions on private use of land and limitations on the arbitrary exercise of power by governmental officials.

This reform task will be difficult and must be approached pragmatically and experimentally. It should not surprise us that much current legal doctrine reflects the existing power distribution, and carries with it the ideological baggage of the powerful controlling classes.¹²⁶ But we should strive to counteract this built-in preference for the status quo. Reform of the Rule and the estate tax is vital if we are to ameliorate the social effects of wealth concentration. Ironically, the problem is best summarized by one who was himself the beneficiary of substantial inherited wealth. Franklin D. Roosevelt said:

The desire to provide security for one's self and one's family is natural and wholesome, but it is adequately served by a reasonable inheritance. Great accumulations of wealth cannot be justified on the basis of personal and family security. In the last analysis such accumulations amount to the perpetuation of great and undesirable concentration of control in a relatively few individuals over the employment and welfare of many, many others.

Such inherited economic power is as inconsistent with the ideals of this generation as inherited political power was inconsistent with the ideals of the generation which established our government.¹²⁷

126. Cf., Van Doren, *Ownership of Yugoslav Social Property and United States Industrial Property—A Comparison*, 26 RUTGERS L. REV. 73 (1972).

127. F.D. Roosevelt, Message to the Congress of the United States, *supra* note 104.

THE NEW FLORIDA ADMINISTRATIVE PROCEDURE
ACT: SELECTED PRESENTATIONS FROM THE
ATTORNEY GENERAL'S CONFERENCE*

A NATIONAL PERSPECTIVE OF ADMINISTRATIVE LAW AND THE
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Robert L. Shevin

RULEMAKING INNOVATIONS UNDER THE NEW ADMINISTRATIVE
PROCEDURE ACT

PATRICIA DORE

* The new Florida Administrative Procedure Act, Fla. Laws 1974, ch. 74-310, became fully effective January 1, 1975. The Attorney General sponsored a conference on the new Act in Tallahassee, Florida, on December 10, 1974. The objectives of the conference were to assist government agencies with implementation of the Act and to introduce the new Act to members of the Florida Bar and the general public. Speakers were invited to discuss specific aspects of the Act. Those chosen included drafters of the Act, officials from both legislative and executive branches of state government, and administrative law professors.