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Qualitative Theory of the Dead Hand

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A Qualitative Theory of the Dead Hand†

ADAM J. HIRSCH* AND WILLIAM K.S. WANG**

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“To give a man power over his property after his death is very considerable, but it is nothing [compared] to an extension of this power to the end of the world.”

Adam Smith¹

INTRODUCTION

The problem of the dead hand, and of the Rule against Perpetuities that restrains it, seems historically to have occasioned more frustration than

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1. ADAM SMITH, LECTURES ON JURISPRUDENCE 467 (R.L. Meek et al. eds., 1978) (ms. 1762-66).

reflection.² The extent to which society should permit testators to control both the present *and future* disposition of their wealth has warmed the scholarly imagination only intermittently. But after a twenty-year lull, interest in the problem is on the rise. The publication of two new model Rules against Perpetuities in the last decade³ has sparked a debate reminiscent of the salad days of perpetuities reform, when the inimitable W. Barton Leach gleefully took on all comers.⁴

2. In the nineteenth century, Lord Hobhouse despaired that the topic had often "proved to be interesting only to a few experts." ARTHUR HOBHOUSE, *THE DEAD HAND* at v (London, Chatto & Windus 1880). In the twentieth century, Professor Leach complained that he had to "ham up" his commentaries on the subject "to get people to read them and thus attract attention to the problem." W. Barton Leach, *Perpetuities Legislation: Hail, Pennsylvania!*, 108 U. PA. L. REV. 1124, 1152 (1960). Despite Leach's best efforts, the Restaters concluded that the public policy of the Rule against Perpetuities "has never been adequately explored and has been seldom discussed." RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 8 (1983). At the same time, the fiendishly difficult calculus of the rule is a matter of legend; Dean Gulliver captured the feelings of many when he remarked that the word "vest" as used in perpetuities analysis "has a rare capacity for engendering other four-letter words." ASHBEL G. GULLIVER, *CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS* 3 (Erwin N. Griswold ed., 1959). Professor Gray, who mastered the rule's calculus more thoroughly than any of his contemporaries, nonetheless agreed that "[t]he study and practice of . . . perpetuities is indeed a constant school of modesty." JOHN C. GRAY, *THE RULE AGAINST PERPETUITIES* at xi (Roland Gray ed., 4th ed. 1942) (1886); see also John W. Weaver, *Fear and Loathing in Perpetuities*, 48 WASH. & LEE L. REV. 1393 (1991). One cannot but wonder whether the frustration and the inattention are subconsciously connected. Professor Simes found attorneys' reactions to the rule similar to that of "the small schoolboy [who] is said proverbially to hope that the school house will burn down." LEWIS M. SIMES, *PUBLIC POLICY AND THE DEAD HAND* 53 (1955).

3. RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 1 (1983); UNIF. STAT. R. AGAINST PERPETUITIES, 8A U.L.A. 342 (Supp. 1992).

4. See Leach, *supra* note 2, for an example of the wickedly entertaining power of his pen. The current debate is dominated by a running colloquy between Professors Jesse Dukeminier and Lawrence Waggoner. For the salvos to date, see Lawrence W. Waggoner, *Perpetuities Reform*, 81 MICH. L. REV. 1718 (1983); Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648 (1985); Lawrence W. Waggoner, *Perpetuities: A Perspective on Wait-and-See*, 85 COLUM. L. REV. 1714 (1985); Jesse Dukeminier, *A Response By Professor Dukeminier*, 85 COLUM. L. REV. 1730 (1985); Lawrence W. Waggoner, *A Rejoinder By Professor Waggoner*, 85 COLUM. L. REV. 1739 (1985); Jesse Dukeminier, *A Final Comment By Professor Dukeminier*, 85 COLUM. L. REV. 1742 (1985); Lawrence W. Waggoner, *Perpetuities: A Progress Report on the Draft Uniform Statutory Rule Against Perpetuities*, 20 U. MIAMI INST. ON EST. PLAN. ch. 7 (1986); Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CAL. L. REV. 1867 (1986) [hereinafter Dukeminier, *Guide*]; Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 REAL PROP. PROB. & TR. J. 569 (1986); Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. REV. 1023 (1987) [hereinafter Dukeminier, *Uniform Rule*]; Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 CORNELL L. REV. 157 (1988). See also, e.g., Ira M. Bloom, *Perpetuities Refinement: There Is an Alternative*, 62 WASH. L. REV. 23 (1987); James S. Chase, *Perpetuity Reform: How Much Do We Need?*, 11 PROB. L.J. 1 (1992); Mary L. Fellows, *Testing Perpetuities Reforms: A Study of Perpetuities Cases 1984-89*, 25 REAL PROP. PROB. & TR. J. 597 (1991); Robert L. Fletcher, *Perpetuities: Basic Clarity, Muddled Reform*, 63 WASH. L. REV. 791 (1988); David S. King & Alexander M. Meiklejohn, *The Uniform Statutory Rule Against Perpetuities: Wait-and-See for 90 Years*, 17 EST. PLAN. 24 (1990). Other recent discussions will appear hereinafter.

Our purpose is not to leap into the current fray, which has mainly concerned the proper framework of "wait-and-see" legislation. This and other technical matters we intend to sidestep entirely. Our aim, rather, is to draw back from the fine details of perpetuities reform (amidst which one is easily mired) and revisit the underlying themes of future interests law itself. It is the deeper *structure* of the problem of intergenerational gratuities that we intend to probe here.⁵ In the glare of recent statutory flourishes, that structure has received less attention than it ought. Yet, as any architect knows, foundations matter—even more than facades.

When contemplating future interests at a structural level, scholars and lawmakers alike have tended to focus on issues of *duration*: how long should the dead hand⁶ retain its grip? Or, to put the question more literally, how long should living persons continue to respect (as a matter of right) the wishes of those who have predeceased them and who have accordingly lost (as a matter of power) the opportunity to control property for themselves? In response, some thinkers have taken the extreme position that because the dead have ceased to be, they deserve no deference whatsoever: control over property is for the living, not the dead.⁷ Others have gravitated to the opposite extreme, asserting, in an argument presently associated with neo-libertarianism, that the right to consume property while alive carries with it by necessary implication an absolute right to control it forever.⁸ Still other theorists have sought to chart a *via media* between these two outer limits. In the leading modern treatise on the policy of the dead hand,

5. Of course, in the process of distancing oneself from technical details, one runs the risk of losing touch with happenings in the real world. We take to heart Hobbes's (playful) warning that "the privilege of Absurdity" belongs to "no living creature . . . but man onely. And of men, those are of all most subject to it, that professe Philosophy." THOMAS HOBBS, *LEVIATHAN* 113 (C.B. Macpherson ed., 1968) (1651). For a recent gasp of exasperation at the otherworldliness of Critical Legal Studies, see Lea Brilmayer, *Response*, 15 FLA. ST. U. L. REV. 477, 483 (1987). Nonetheless, it remains our hope and conviction that one can attain a stable orbit between the client conference room and the emptiness of outer space.

6. The analysis here will focus on testamentary transfers. Cognate problems also arise in connection with *inter vivos* gifts; the problems tend to merge, in that the living hand that clings too long will eventually become a dead one.

7. This argument was featured in the writings of various European and American republican theorists and led some to propose either mandatory rules of succession or the abolition of inheritance. Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1 (1977). For a recent discussion, see Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 76-84 (1990). See also BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 201-07 (1980) (positing a political right to initial equality at each generation; but the right is *waivable* in order to encourage the previous generation to produce and save).

8. For recent statements of this position, see RICHARD A. EPSTEIN, *TAKINGS* 304 (1985); Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 704-05, 710-13 (1986). See also Ronald C. Link, *The Rule Against Perpetuities in North Carolina*, 57 N.C. L. REV. 727, 818-26 (1979) (positing a non-libertarian analysis). Viewing these two extreme positions as leading conceivably to a philosophical antinomy, see HENRY SIDGWICK, *THE ELEMENTS OF POLITICS* 52-53, 100 (4th ed. 1919) (1891).

Professor Lewis Simes called for "a fair balance between the desires of members of the present generation, and similar desires of succeeding generations."⁹ The prevailing Rule against Perpetuities follows this last approach. To the question of how long the living will defer to the wishes of the dead, the Rule replies with sublime economy: for "lives in being plus twenty-one years."¹⁰

The premise of this Article is that all such one-dimensional analyses, generating in turn one-dimensional solutions, oversimplify the problem of the dead hand. A future interest includes qualitative, as well as temporal, components. As a matter of public policy, lawmakers should consider not only for how long but also *in what ways* a testator proposes to control property after her death. A testator might, for instance, seek to impose her will over the subsequent *use* of property. Alternatively or additionally, she might seek to control the *investment* of property, the *distribution* of property, or the *range of beneficiaries* (without precise allocations) eligible in due course to receive property. In qualitative terms, the dead hand is not all-embracing; it grips, so to say, with a variety of fingers.¹¹ Each imposes a different set of social pressures that have to be addressed independently. To be sure, legal commentators have not been entirely numb to these distinctions.¹² Nor have they been completely ignored by all lawmakers.¹³ But the qualitative dimension of dead hand control has never received systematic treatment, and the prevalent versions of the Rule against Perpetuities—both orthodox and reformed—take no account of it.

9. SIMES, *supra* note 2, at 58.

10. Technically, the Rule restricts provisions for remote vesting rather than prolonged duration, but duration is thereby limited indirectly. The classical introduction to the mechanical operation of the Rule is W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938). For a modern recitation, also covering the workings of perpetuities reform legislation, see Dukeminier, *Guide*, *supra* note 4. Suggesting relocations of the line drawn by the Rule, see, for example, SIMES, *supra* note 2, at 68-70; JOHN H. MORRIS & W. BARTON LEACH, *THE RULE AGAINST PERPETUITIES* 65-70 (2d ed. 1962). On the rules governing the duration of dead hand control under civil law, see Edward F. Martin, *Louisiana's Law of Trusts 25 Years After Adoption of the Trust Code*, 50 LA. L. REV. 501, 508-11, 514-16, 519-20 (1990).

11. We beg the gentle reader's pardon for extending a ghoulish metaphor. Along with its durational and qualitative dimensions, exercises of dead hand control have still another "substantive" dimension: the substantive decision of the dead hand to favor one sort of beneficiary or purpose as opposed to another may have different social consequences. Lawmakers have responded to distinctions in this dimension by establishing special rules to govern charitable trusts and, *e contra*, trusts for purposes against public policy.

12. The distinctions drawn thus far have been fragmentary and remain incomplete. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* §18.6, at 512-13 (4th ed. 1992) (distinguishing conditional and unconditional bequests); Robert C. Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 WASH. U. L.Q. 723, 734-37 (1986) (distinguishing control over use and distribution); Paul G. Haskell, *A Proposal for a Simple and Socially Effective Rule Against Perpetuities*, 66 N.C. L. REV. 545, 548-49 (1988) (distinguishing bequests in and out of trust).

13. See *infra* notes 205, 210 and accompanying text.

One of the proverbial criticisms of the Rule against Perpetuities is its mechanical complexity. Despite the ease with which it can be stated, the Rule is anything but easy to interpret and apply.¹⁴ Attention to the qualitative dimension of future interests suggests, however, that the Rule may not be complex enough. By collapsing the various strains of dead hand control and imposing the same durational limits upon each, the Rule telescopes the problem of future interests, ignoring structural variations that relate directly to traditional policy concerns. In order to dispose of those concerns, legal regulation of future interests may well require more precise calibration according to the attributes of control which testators seek to retain in any given case.

The analysis that follows will proceed in stages. In Part I we survey the larger problem of freedom of testation in order to get our bearings for a more focused inquiry into the assertion of protracted dead hand control. We then proceed in Part II to examine *seriatim* the various categories of control a testator may wish to exert, appraising their respective social repercussions and the potential rationales for their legal regulation. Finally, in Part III we match our qualitative model against the current framework of future interests law in order to develop, in a broad and preliminary sort of way, applications that might fulfill perpetuities policy in a more sensitive and discriminating manner.

I. TESTAMENTARY JURISPRUDENCE

The testator's right to control property along the plane of time builds upon a more essential right—namely, her right to bequeath property outright to beneficiaries. Before a testator can aspire to create a future interest, she must possess the power to bestow a present interest.¹⁵ The policies that dictate fidelity to the wishes of the dead in initially distributing property also bear upon more ambitious efforts to project power beyond mortal constraints. Substantive analysis of future interests law must therefore begin

14. See *supra* note 2. Professor Gray's formulation of the Rule required a mere thirty-two words. But as Professor Leach observed, "these . . . words obviously cannot tell [us] the whole story, else the 833 pages of Gray's treatise would be useless." W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 746 (1952). One is reminded of Robert Frost's remark on Einstein's special theory of relativity: "e=mc²; what's so hard about that? Of course, what e, m, and c are is harder." Arthur A. Leff, *Unconscionability and the Code—the Emperor's New Clause*, 115 U. PA. L. REV. 485, 486 n.7 (1967) (quoting Robert Frost).

15. The distinction drawn here between freedom to create "present" and "future" interests uses those terms in a non-technical sense rather than as terms of art. By future interest, we mean any bequest in which dead hand control extends into the future, which would technically include present interests other than a fee simple absolute. Historically, testamentary future interests first appeared under Roman law. ALAN WATSON, *THE LAW OF SUCCESSION IN THE LATER ROMAN REPUBLIC* 35-39, 52-60 (1971). On their common law origins, see A.W.B. SIMPSON, *A HISTORY OF THE LAND LAW* 78-87 (2d ed. 1986).

with a litany of the justifications for basic freedom of testation in order to assess whether these, in turn, will sustain more sweeping grants of dead hand control.¹⁶

A. Present Interests

The traditional rationales for testamentary freedom are as varied as they are controversial. Perhaps oldest is the notion that testators have a natural right to bequeath.¹⁷ Having created wealth by the sweat of her brow, the testator is naturally free to do with it as she pleases—including passing it along to others. Locke and Grotius, among other philosophers, took this view,¹⁸ which after centuries in eclipse has lately drawn flickers of judicial support.¹⁹ Yet, from at least the seventeenth century, ideologists have disputed the natural theory of testation on various grounds. As William Paley observed, not all property that testators own actually owes to their labor. Paley acknowledged a natural right to bequeath whatever the testator personally created; but, added Paley, “every other species of property,

16. The right of *testation* (that is, the right of an owner at death to choose the beneficiaries of her property) must be distinguished analytically from freedom of *inheritance* (that is, the freedom of an owner at death to avoid confiscation of her property by the state). Lawmakers can deny the first but still grant the second by fixing rules of succession that pay no regard to testamentary intent; likewise, they can grant the first but curtail the second by deferring to testamentary intent while heavily taxing inherited wealth. Though some of the traditional justifications for freedom of testation and inheritance overlap, others, as we shall see, do not.

17. Such a natural right was posited by Roman jurists. On freedom of testation in the classical world, see LUIGI MIRAGLIA, *COMPARATIVE LEGAL PHILOSOPHY* 732-37, 741-42 (John Lisle trans., 1921).

18. Locke and Grotius both qualified the natural right of testation, however, insofar as it conflicted with the testator's natural obligations to his dependents: “a *Father* may dispose of his own Possessions as he pleases, when his Children are out of danger of perishing from want.” JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* bk. 2, §§ 27, 65 at 305-06, 329 (Peter Laslett ed., 2d ed. 1970) (1690) (emphasis in original); 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 265 (Francis W. Kelsey trans., 1925) (1625); see also IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 108, 110-11, 171-72 (Mary Gregor trans., 1991) (1797), discussed *infra* note 23; 2 SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* 617 (C.H. Oldfather & W.A. Oldfather trans., 1934) (1688) (quoting G.W. LEIBNITZ, *NOVA METHODUS JURISPRUDENTIAE* (1667)); cf. LOCKE, *supra*, bk. 1, §§ 88-93, at 224-28; *id.* bk. 2, § 190, at 411-12 (commenting on the freedom of owners to provide inheritances, and on children's right to demand them).

19. *Shriners Hosps. for Crippled Children v. Zrillic*, 563 So. 2d 64, 67-68 (Fla. 1990). This theory has also been adopted by the Supreme Court of Wisconsin. *In re Beale's Estate*, 113 N.W.2d 380, 383 (Wis. 1962) (see also earlier cases cited therein). For a discussion of the case law, see 1 WILLIAM H. PAGE, *ON THE LAW OF WILLS* § 3.1, at 62-67 (William J. Bowe & Douglas S. Parker eds., rev. ed. 1962). See also *Hodel v. Irving*, 481 U.S. 704 (1987) (offering ambiguous discussion of the constitutional right of testation); Daniel J. Kornstein, *Inheritance: A Constitutional Right?*, 36 *RUTGERS L. REV.* 741 (1984) (commenting on the constitutional freedom to provide inheritances). *But cf.* *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942) (“Rights of succession . . . are of statutory creation, and the dead hand rules succession only by sufferance.”) (see also earlier cases cited therein).

especially property in land, stands upon a different foundation."²⁰ Paley's critique was at once both perceptive and shortsighted. The notion that one could acquire natural rights over property through trade rather than direct production seems entirely to have escaped him. For Paley, such rights could adhere only in those kinds of property that were *intrinsically* labor intensive, "where the value of the labor bears a considerable proportion to the value of the thing."²¹ Natural rights did not attach to any other property—even when *purchased* with hard-earned silver. But despite this lapse of vision, Paley did controvert the natural right to bequeath that which the testator had herself inherited.²² William Blackstone went a step further, asserting a natural right to dispose of property only during the testator's lifetime. At the moment of death, the testator lost her right to all species of property, self-made and inherited, on the theory that nature protects only the living.²³ Jeremy Bentham, John Stuart Mill, and other utilitarian philosophers refused to concede even that much. For utilitarians, only the promotion of happiness could justify the granting of rights; the notion that persons, while living or dead, held rights of any sort flowing from nature was for Bentham "nonsense upon stilts."²⁴

Seemingly as old as the natural rights rationale for freedom of testation are other rationales premised on the sort of utilitarian calculus that Bentham and his disciples methodized. One argument, tracing back to the thirteenth

20. 1 WILLIAM PALEY, *THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY* 221-22 (London 1791).

21. *Id.*

22. This point has been made more recently by Professor Munzer. STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 395-96 (1990) ("[T]he labor-desert principle can support at most a one-time power of gift or bequest."). But could one counterargue that, by creating property through labor, the owner has a natural right not only to bequeath to her beneficiary but also to bequeath *the power to bequeath*?

23. 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *10-11 (London 1765-69). Similarly, William Godwin: "It is the most extravagant fiction, which would enlarge the empire of the proprietor beyond his natural existence, and enable him to dispose of events, when he is himself no longer in the world." WILLIAM GODWIN, *ENQUIRY CONCERNING POLITICAL JUSTICE* 718 (Penguin Classics 1985) (1793). The argument reaches back at least to Pufendorf (who also buttressed his criticism of the natural theory of testation with Biblical evidence). 2 PUFENDORF, *supra* note 18, at 615-20. Compare Leibnitz, who conceived freedom of testation as a continuation of the natural right of the living owner, now lodged in the immortal soul: "[S]ince the dead are in fact still alive, they remain for that reason owners of things, and the heirs [sic] they have left are to be considered as stewards over their property." *Id.* at 617 (quoting G.W. LEIBNITZ, *NOVA METHODUS JURISPRUDENTIAE* (1667)). Adam Smith dismissed Leibnitz's argument as whimsical. SMITH, *supra* note 1, at 63, 466. Compare also Kant, who, while recognizing that testation did not involve an actual transfer between living persons, still viewed it as an "ideal" transfer based on an "idea of pure reason" which could be conceived in a state of nature and which, accordingly, could have the status of a natural right. KANT, *supra* note 18, at 108, 110-11, 171-72.

24. 2 JEREMY BENTHAM, *Anarchical Fallacies*, in *THE WORKS OF JEREMY BENTHAM* 501 (John Bowring ed., 1962) (ms. n.d.) [hereinafter *WORKS*]. On this debate, see generally RONALD CHESTER, *INHERITANCE, WEALTH, AND SOCIETY* 11-58 (1982).

century jurist Henry de Bracton, if not earlier, holds that freedom of testation creates an incentive to industry and saving.²⁵ Bracton's assumption—shared by modern social scientists—was that persons derive satisfaction out of bequeathing property to others.²⁶ To the extent that lawmakers deny persons the opportunity to bequeath freely, the subjective value of property will drop, for one of its potential uses will have disappeared. As a result, thwarted testators will choose to accumulate less property, and the total stock of wealth existing at any given time will shrink. Testamentary freedom accordingly fulfills the normative goal of wealth maximization, which is advanced by its proponents as the best available barometer of utility maximization.²⁷

Scholars have offered a number of objections and qualifications to this argument, however. As is often remarked, persons may strive to amass wealth over and above the needs of lifetime consumption for a variety of psychological and other reasons that have naught to do with the longing to bequeath. Persons accumulate to gratify their egos, to gain prestige, to gain power—and simply out of habit. Once these impulses are taken into account, the economic contributions traceable to freedom of testation could turn out

25. The theory applies both to freedom of testation and to freedom to provide inheritances. For early statements of the principle, see 1 JEREMY BENTHAM, *Principles of the Civil Code, in* WORKS, *supra* note 24, at 338 (ms. c. 1775-1802); 2 BLACKSTONE, *supra* note 23, at *11; 2 HENRY DE BRACTON, *ON THE LAWS AND CUSTOMS OF ENGLAND* 182 (George E. Woodbine ed. & Samuel E. Thorne ed. & trans., 1968) (ms. c. 1230); 1 FRANCIS HUTCHESON, *A SYSTEM OF MORAL PHILOSOPHY* 352 (London 1755); 1 JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* 221 (Colonial Press 1899) (1848). For modern restatements, see THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* 34 (2d ed. 1953); ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 165 (1988); Gordon Tullock, *Inheritance Justified*, 14 J.L. & ECON. 465 (1971). See also *infra* note 146.

26. The nature of that satisfaction—whether (or to what extent) it is genetically programmed (“nepotism”) rather than derived from social interaction (“altruism”), and whether it can involve altruistic impulses other than those signalling interdependent utilities with the beneficiary—remains unclear. For recent discussions, see HELENA CRONIN, *THE ANT AND THE PEACOCK: ALTRUISM AND SEXUAL SELECTION FROM DARWIN TO TODAY* 325-80 (1991); Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 526-29 (1990); John H. Beckstrom, *Sociobiology and Intestate Wealth Transfers*, 76 NW. U. L. REV. 216 (1981).

27. The normative virtues of wealth maximization are elaborated and defended at length in RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 13-115 (1981). But the goal remains controversial. For debates over the issue, see, for example, Jules L. Coleman, *Efficiency, Utility and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980); Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980); Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227 (1980); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980); Richard A. Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243 (1980). For a recent criticism, see Herbert Hovenkamp, *Positivism in Law and Economics*, 78 CALIF. L. REV. 815 (1990). Disputing the normative legitimacy of wealth maximization would provide a more fundamental critique of the instant justification for freedom of testation. For purposes of analysis here, we shall accept wealth maximization as a valid goal and assess the extent to which it is fulfilled on its own terms by permitting testators to bequeath present and future interests in property.

to be small.²⁸ Furthermore, the productivity effect of testamentary freedom will be offset by the extent to which bequests dampen beneficiaries' incentives to produce their own wealth. On the balance sheet of wealth creation, a credit in one generation may induce a debit in the next, diminishing the net intergenerational increase in property.²⁹

Another argument for freedom of testation, also premised upon the goal of wealth enhancement, is that such freedom supports, as it were, a market for the provision of social services. Social life, like commercial life, is not a one-way street. Though classified by the law as "gratuitous" transfers, bequests within the family may in fact repay the beneficiary for "value" received³⁰ (though of a sort not recognized as consideration under the

28. The point has long been recognized. A.C. FIGOU, *THE ECONOMICS OF WELFARE* 718-19 (1932); JOSIAH WEDGWOOD, *THE ECONOMICS OF INHERITANCE* 213-16, 232 (4th. ed. 1962); Ascher, *supra* note 7, at 100-11. Economists have lately sought to determine the impact of bequest motives on productivity and saving through analysis of empirical evidence. The results are inconclusive. Cf. B. Douglas Bernheim, *How Strong Are Bequest Motives? Evidence Based on Estimates of the Demand for Life Insurance and Annuities*, 99 J. POL. ECON. 899 (1991) (finding evidence of a strong bequest motive); Michael D. Hurd, *Savings of the Elderly and Desired Bequests*, 77 AM. ECON. REV. 298 (1987) (finding no evidence of a bequest motive); see also Denis Kessler & Andre Masson, *Bequest and Wealth Accumulation: Are Some Pieces of the Puzzle Missing?*, 3 J. ECON. PERSP., Summer 1989, at 141; Laurence J. Kotlikoff, *Intergenerational Transfers and Savings*, 2 J. ECON. PERSP., Spring 1988, at 41; Franco Modigliani, *The Role of Intergenerational Transfers and Life Cycle Saving in the Accumulation of Wealth*, 2 J. ECON. PERSP., Spring 1988, at 15.

29. This point is a qualification rather than a criticism, for it applies to inheritance generally, irrespective of whether the testator or the state selects the beneficiaries in the next generation. Freedom of *testation* will not, strictly speaking, adversely affect the productivity of the next generation, but freedom to provide *inheritances* could have such an effect. For discussions, see WEDGWOOD, *supra* note 28, at 207-08; Ascher, *supra* note 7, at 99; D.W. Haslett, *Is Inheritance Justified?*, 15 PHIL. & PUB. AFF. 122, 145 (1986); Joseph Gold, *Freedom of Testation*, 1 MOD. L. REV. 296, 297 (1938). It is once again unclear what effect (if any) bequests have on beneficiaries' propensities to produce; economists have yet to investigate this question. See also *infra* text accompanying notes 190-91.

30. Scholarship on the social psychology and cultural anthropology of gratuitous transfers is surveyed in Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155, 194-98 (1989); Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 630 nn.203-05 (1989). For some recent contributions to the anthropological literature, see RISK AND UNCERTAINTY IN TRIBAL AND PEASANT ECONOMIES pt. 2 (Elizabeth Cashdan ed., 1990). For an economic analysis, see B. Douglas Bernheim et al., *The Strategic Bequest Motive*, 93 J. POL. ECON. 1045 (1984). For empirical evidence, see MARVIN B. SUSSMAN ET AL., *THE FAMILY AND INHERITANCE* 83-120, 286-314 (1970); JEFFREY P. ROSENFELD, *THE LEGACY OF AGING* (1979). For a sociobiological perspective on the problem, see John Tooby & Leda Cosmides, *Evolutionary Psychology and the Generation of Culture, Part II. Case Study: A Computational Theory of Social Exchange*, 10 ETHOLOGY & SOCIOBIOLOGY 51 (1989). For a historical discussion, see KEITH HOPKINS, *DEATH AND RENEWAL* 235-47 (1983) (on Roman wills). See generally ROBERT M. AXELROD, *THE EVOLUTION OF COOPERATION* (1984); JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* 300-21 (1990); SOCIAL EXCHANGE (Kenneth J. Gergen et al. eds., 1980). On the relative significance of intrafamily exchange and intrafamily altruism, see Gary S. Becker & Kevin M. Murphy, *The Family and the State*, 31 J.L. & ECON. 1, 4 (1988); Donald Cox, *Motives for Private Income Transfers*, 95 J. POL. ECON. 508 (1987).

common law).³¹ What Lord Hobhouse termed "the delicate interdependence of Parent and Child" could wither were testamentary freedom denied, a point made by many legal scholars (and dramatists) beginning with Bracton³² and hinted at still earlier in scripture and classical philosophy.³³ Cast into the icy language of economics, testamentary freedom serves the public interest by promoting the creation of greater stocks of *noncommodity* wealth. The testator's power to bequeath encourages her beneficiaries to provide her with care and comfort—services that add to the total economic "pie."

Once again, critics have challenged this rationale on several grounds. As one economist has noted, would-be beneficiaries have an incentive to engage in *unwanted*, and hence socially wasteful, activities in the hope of capturing a bequest. This phenomenon, known generically as rent seeking, occurs whenever persons have access to formally uncompensated transfers. In this instance, the beneficiaries' worthless behavior becomes a concomitant to desired reciprocation and vanishes along with it where testamentary freedom is denied.³⁴ More generally, some scholars have doubted the social utility

31. What is interesting here from the perspective of sociology is the cultural taboo against acknowledging *formally* that any exchange is occurring when a gratuity is bestowed. When persons *openly* perform social services as a quid pro quo for gratuities they are often subjected to moral censure. For reasons that remain obscure, but deserve exploration, the culture of gifts is premised on a social fiction. For some preliminary thoughts, see HOPKINS, *supra* note 30, at 239; PETER M. BLAU, *EXCHANGE AND POWER IN SOCIAL LIFE* 112 (1964); KENNETH E. BOULDING, *THE ECONOMY OF LOVE AND FEAR* 25-26 (1973).

32. HOBHOUSE, *supra* note 2, at 187. The argument once again applies to both the right of testation and the freedom to provide inheritances. *Id.* at 187-88; 1 BENTHAM, *supra* note 25, at 337; BLACKSTONE, *supra* note 23, at *11; 2 BRACTON, *supra* note 25, at 181; 1 PAGE, *supra* note 19, § 1.7, at 28 (citing to judicial authorities); Gabrielle A. Brenner, *Why Did Inheritance Laws Change?*, 5 INT'L REV. L. & ECON. 91 (1985); Max Nathan, Jr., *An Assault on the Citadel: A Rejection of Forced Heirship*, 52 TUL. L. REV. 5, 15-16 (1977). The point has found expression in popular culture, most notably in the work of William Shakespeare. WILLIAM SHAKESPEARE, *KING LEAR* (J.S. Bratton ed., 1987); see also BEN JONSON, *VOLPONE* (Jay L. Halio ed., 1968). The larger point that gratuities function within a social fabric of implicit reciprocity has been recognized (and parodied) by humbler bards as well. One of us recalls from childhood the fascination of an episode of the popular television series *Bonanza* in which the Cartwright brothers opened a livery stable, only to discover that they were being lowballed by the competition. They then came up with the idea of offering their livery services *for free* and soliciting *contributions* only. With that social strategy, the Cartwrights cleaned up!

33. "Give not to son or wife, brother or friend, power over thee while thou livest; and give not thy estate to another, lest thou repent, and entreat for the same. . . . In all thy works keep the pre-eminence. . . . In the time when thou shall end the days of thy life, and in the time of thy decease, distribute thy inheritance." *Sirach* 33:20-24 (*Ecclesiasticus*, New American Bible). King Lear could have benefited from this advice. See SHAKESPEARE, *supra* note 32. Aristotle discussed the culture of reciprocity between friends and between parent and child in *THE NICHOMACHEAN ETHICS OF ARISTOTLE*, bk. 8, chs. 15-16, at 276-80 (J.E.C. Welldon ed., 1912) (ms. c. 334-23 B.C.).

34. James M. Buchanan, *Rent Seeking, Noncompensated Transfers, and Laws of Succession*, 26 J.L. & ECON. 71 (1983). Translated into English: "Children all too often make their

of even the desired activities promoted by freedom of testation. Such activities can become socially harmful when the testator seeks not to elicit love and affection but rather to intrude in pernicious ways upon the beneficiary's personal decisions.³⁵ But the strongest argument against this rationale may be the practical observation that supplies of social services appear generally to be inelastic; they are forthcoming, in poor families as in rich, more or less irrespective of the suppliers' inheritance prospects. Just as an assortment of motives drives persons to produce wealth, so does a complex of motives and emotions stimulate persons to care for each other. Once again, the economic impact of testamentary freedom could prove to be small.

A secondary justification for the right of testation is that it would in practice be difficult to curtail. Were lawmakers to rescind the power of the will, testators would find other, less efficient ways to direct the distribution of their wealth. "To attempt therefore to take the disposal out of their hands, at the period of their decease, would be an abortive and pernicious project," William Godwin opined two centuries ago. "If we prevented them from bestowing it in the open and explicit mode of bequest, we could not prevent them from transferring it before the close of their lives, and we should open a door to vexatious and perpetual litigation."³⁶ The point is well taken but hardly limited to wills: every law implicates costs of enforcement, and some judgment must always be made about whether the game

parents' lives miserable trying to ensure places for themselves in their parents' wills." Ascher, *supra* note 7, at 112. For a related finding by a cultural anthropologist, see COLIN M. TURNBULL, *THE MOUNTAIN PEOPLE* 146 (1972) (discussing unwanted gifts made in order to oblige reciprocation). But see Gary M. Anderson & Pamela J. Brown, *Heir Pollution: A Note on Buchanan's "Laws of Succession" and Tullock's "Blind Spot"*, 5 INT'L REV. L. & ECON. 15 (1985) (criticizing Buchanan's analysis); David E. Sisk, *Rent-Seeking, Noncompensated Transfers, and Laws of Succession: A Property Rights View*, 46 PUB. CHOICE 95 (1985) (same).

35. Again, the idea is venerable: while Hegel favored inheritance as a way of maintaining the cohesiveness of families, he opposed testation, inter alia, because it was "likely to be an occasion . . . for mean exertions and equally mean subservience." GEORG W.F. HEGEL, *THE PHILOSOPHY OF RIGHT* (1821), reprinted in 46 GREAT BOOKS OF THE WESTERN WORLD 62-63 (Robert M. Hutchins ed. & T.M. Knox trans., W. Benton 1952); see also WILLIAM M. MCGOVERN, JR. ET AL., *WILLS, TRUSTS AND ESTATES* § 3.1, at 88 (1988); Edward Jenks, *English Civil Law*, 30 HARV. L. REV. 109, 119-20 (1916).

36. GODWIN, *supra* note 23, at 718-19. Similarly, Francis Hutcheson: "Take away this right and . . . men must be forced into a pretty hazardous conduct by actually giving away during life whatever they acquire beyond their own probable consumption . . ." 1 HUTCHESON, *supra* note 25, at 352. The argument has been repeated by modern theorists, both in connection with the right of testation and the freedom to provide inheritances. SIDGWICK, *supra* note 8, at 53 & n.1, 105 & n.1; COOTER & ULEN, *supra* note 25, at 164-65; F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 91 (1960); Michael J. Boskin, *An Economist's Perspective on Estate Taxation*, in *DEATH, TAXES AND FAMILY PROPERTY* 62-63 (Edward C. Halbach, Jr. ed., 1977); cf. Ascher, *supra* note 7, at 116 (questioning the magnitude of this difficulty). The litigation predicted by Godwin occurs today in connection with testators' sporadic efforts to avoid the forced share for a surviving spouse. See generally MCGOVERN ET AL., *supra* note 35, § 3.8, at 118-22.

is worth the candle. In the present context, we may observe that the game society has selected, whereby the law *does* grant freedom to bequeath, also requires costly illumination: just as testators would maneuver to win this power were it denied, heirs often maneuver to frustrate it once it is allowed. Under the current regime of testamentary license, litigation to construe or to avoid wills, shamefully vexatious and wearily perpetual, occurs all the time—and has been cited as a drawback of *free* testation.³⁷ Whether free or forced testation would take the larger toll of conflict and evasion is difficult to anticipate.

Still another argument for freedom of testation offered on occasion is that such freedom “permits more intelligent estate planning,” by allowing the testator to “take account of the differing needs” of members of her family.³⁸ We call this idea the “father knows best” hypothesis.³⁹ It is important to notice that the normative foundation for the hypothesis differs from that of the last three. “Intelligent estate planning” is not synonymous with wealth enhancement. No wealth is created when a bequest bypasses one who needs it less to reach one who needs it more. Still, money is not everything; theorists may (and do) stipulate any number of norms or ethical values that, along with wealth, contribute to social well-being.⁴⁰ For proponents of intelligent estate planning, distribution of the decedent’s resources in response to the particular needs of family members is assumed to be a social virtue,⁴¹ one that freedom of testation promotes.⁴²

37. ATKINSON, *supra* note 25, at 34.

38. This rationale is featured in MCGOVERN ET AL., *supra* note 35, § 3.8, at 88-89. For early expressions of the argument, see T.H. GREEN, LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION 173 (Paul Harris & John Morrow eds., 1986) (ms. c. 1879); I HUTCHESON, *supra* note 25, at 354; SIDGWICK, *supra* note 8, at 100-02; see also *infra* note 53 (quoting Lord Hobhouse). The argument presupposes a freedom to provide inheritances, for absent such a freedom the need for intelligent allocation of bequests within the family would not arise.

39. Those readers sensitive to such matters may substitute for “father knows best” the culturally obscure but politically correct “parent knows best.”

40. On the relativism of the efficiency norm, see, for example, ROBERT E. GOODIN, REASONS FOR WELFARE 245-53 (1988). See also *supra* note 27.

41. The norm has ancient roots, tracing back to scripture: “[A]nd distribution was made unto every man according as he had need . . .” Acts 4:35 (King James). For modern jurisprudential articulations, see, for example, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 174 (1980); JOHN RAWLS, A THEORY OF JUSTICE 276-77 (1971); see also *id.* at 75-80 for a related concept. Like wealth maximization, need satisfaction can be viewed as a means of enhancing utility, so long as we are prepared to concede the feasibility of interpersonal utility comparisons—a controversial point. See *infra* note 129 and accompanying text. Still, the norm of need satisfaction could also be said to “objectify” utility, in that the norm presumably would not acknowledge the bloated wants of the greedy (Professor Nozick’s “utility monsters”). See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 41 (1974).

42. Distributive variations to fit family circumstances could be achieved *without* freedom of testation by giving courts (instead of testators) discretion to divide estates. Such an approach would, however, entail substantially higher information and administrative costs. Nonetheless, Great Britain has put into practice a system for deviation from estate plans upon judicial hearing. Joseph Laufer, *Flexible Restraints on Testamentary Freedom—A Report on Decedents’ Family Maintenance Legislation*, 69 HARV. L. REV. 277 (1955).

Whether testamentary freedom typically gives rise to intelligent estate planning is, however, open to some question. Once again, certain factors militate against the proposition. Information costs present one impediment, though these are likely to be small in the family setting. More significant perhaps is the hiatus that often intervenes between will execution and testamentary distribution. Wills frequently mature years after they are executed, and the cost (both economic and psychological)⁴³ of adding codicils may deter testators from updating estate plans to take into account changed circumstances. Estate plans become increasingly stale as time passes, and due to human inertia they tend to remain so.

Furthermore, the assumption that testators will in general use freedom of testation to craft thoughtful schemes of distribution is not unproblematic. Only a small fraction of wills is drafted with the assistance of experienced estate planners. The volume of thought that goes into the process is often minimal.⁴⁴ And a testator may also lack inhibitions at death that tempered her course of conduct during life. As one astute observer has remarked, "Making a will is an exercise of power without responsibility."⁴⁵ Living persons suffer the consequences that follow from their actions; dead persons do not. As a result, testators making private provision for the distribution of assets at their deaths are free to behave as responsibly *or irresponsibly* as they choose, without bearing the interpersonal costs that living persons pay for eccentric behavior. There exists, in other words, something close to a moral hazard of testation.⁴⁶ Given all these distortions, freedom of testation could result in less intelligent estate planning overall than some have supposed.⁴⁷ Father may *know* best; but, alas, we have no assurance that in practice he will *do* what is best.⁴⁸

43. Impediments to testation are briefly discussed in JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 75-76 (4th ed. 1990); Nathan Roth, *The Psychiatry of Writing a Will*, 41 AM. J. PSYCHOTHERAPY 245 (1987). Cultural superstitions are doubtless also involved.

44. See Mary L. Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611 (1988) (arguing that the law should step in to compensate in certain situations for poor estate planning by testators).

45. M. Meston, *The Power of the Will*, 1982 JURID. REV. 172, 173. For an earlier discussion, see Austin W. Scott, *Control of Property by the Dead* (pt. 2), 65 U. PA. L. REV. 632, 657 (1917).

46. Hirsch, *supra* note 30, at 639. On the concept of moral hazard, see *infra* note 175. (Testators who believe in an afterlife may, however, expect to face retribution for their acts of irresponsibility, up to and including their actions at death.) A related problem arises in connection with partners or other fiduciaries who are about to retire. In that context, economists call this the "end-game problem." COOTER & ULEN, *supra* note 25, at 244-45.

47. But see the empirical studies cited *infra* note 164. The prospect of eccentric estate planning under a regime of free testation again raises efficiency, as well as equity, concerns, in that disinherited dependents may become public charges. H.R. Hahlo, *The Case Against Freedom of Testation*, 76 S. AFR. L.J. 435, 442-44 (1959).

48. Even when father *does* do what is best, however, thoughtful estate planning is not necessarily an unmitigated blessing. Testators' efforts to divide their estates in a manner best suited to the needs of their families could, wittingly or unwittingly, produce resentment and

A final justification for freedom of testation, formulated with disarming unaffectedness by Professor Simes, is simply that the power to bequeath comports with political preferences: "the desire to dispose of property by will is very general, and very strong. A compelling argument in favor of it is that it accords with human wishes."⁴⁹ However ingenious, this analysis seems less persuasive on closer inspection. While the desire to enforce one's *own* will may be general and strong, the desire to enforce *someone else's* will—apart from aspirations to the various social advantages already discussed—is less plainly apparent. In his *Lectures on Jurisprudence*, Adam Smith offered a few thoughts on this matter. He explained human deference to wills as an outgrowth of "a kind of piety for the dead." "We naturally find a pleasure in rememb[er]ing the last words of a friend and in executing his last injunctions," Smith continued, "[and] we would be distressed to see our [own] last injunctions not performed. Such sentiments natural[ly] [i]nclined men to extend property a little farther than a man's lifetime."⁵⁰ Smith's anticipatory gloss on Simes's epigram helps to expose its logical edges. While persons ordinarily may desire to carry out the last wishes of their loved ones, this sentiment cannot be expected to accompany arbitrary and capricious bequests. Piety follows from mutual affection, and these ties (to the extent that they persist post mortem) are severed by an unprincipled estate plan.⁵¹ Nor would most testators likely support the right of others to bequeath capriciously simply to gain the same right for themselves. Such a right would be worthless for the majority of testators who have no desire to make unorthodox bequests.

B. Future Interests

We have in the foregoing pages briefly rehearsed the traditional justifications for freedom of testation. While none is foolproof, a rational argument surely can be made for each of them (though with counterargu-

conflict among the beneficiaries, who may not all concur with the testator's calculations. Such intra-family disharmony (sometimes persisting for decades) can constitute a social side effect of freedom of testation that detracts from its utility as a means of promoting the welfare of beneficiaries. Still, disharmony can also follow instances of intestacy (where the court applies a fixed scheme of succession), and it remains unclear whether freedom of testation on balance aggravates or alleviates the social disruption of the inheritance process. For discussions, see Jeffrey P. Rosenfeld, *Social Strain of Probate*, 6 J. MARITAL & FAM. THERAPY 327 (1980); Sandra L. Titus et al., *Family Conflict Over Inheritance of Property*, 28 FAM. COORDINATOR 337 (1979).

49. SIMES, *supra* note 2, at 21.

50. SMITH, *supra* note 1, at 63-64, 466-67.

51. As Hegel put it: "The mere downright arbitrariness of the deceased cannot be made the principle underlying the right to make a will . . . [f]or after all no respect would be forthcoming for his wishes after his death, if not from the family's love and veneration for its deceased fellow-member." HEGEL, *supra* note 35, at 62.

ments following hard on their heels). Accepting these justifications for the sake of discussion, how well do they serve to support freedom to control property on into the future? Can they be stretched to cover bequests of future, as well as present, interests?

As readily appears, some justifications for testamentary freedom hardly apply to future interests. The argument that bequests operate to support a market for social services has little if any bearing on bequests to the unborn. Unborn beneficiaries may eventually feel grateful to the testator, but they are in no position (at least directly) to reciprocate.⁵² Nor does the argument that restrictions on testamentary freedom cost too much to enforce carry over to future interests. While it may indeed be difficult to prevent a determined testator from making surreptitious distributions to favored beneficiaries, future interests by their nature are legal constructs; they cannot be conferred with a wink and a nod. The hypothesis that father knows best may have a slightly broader reach, but it still appears most plausible with respect to the present generation, with whose needs the testator is acquainted. There is far less reason to suppose that grandfather, let alone great-grandfather, will know best—certainly not by comparison to members of the later generation.⁵³

The utility of natural rights theory to defend extended dead hand control is also suspect. For Blackstone, the very proposition of such prolonged control was the *reductio ad absurdum* that disproved the natural theory of testation: "For, naturally speaking, . . . if [a man] had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him; which would be highly absurd and inconvenient."⁵⁴ Other early natural rights theorists seem not to have addressed the point, but modern judicial opinions characterizing

52. "Making sacrifices for a distant posterity is clearly the purest form of [gratuity] that can be imagined, for there can be no vestige of exchange in it." Boulding, *supra* note 31, at 97. The point is, however, slightly overstated. Persons have been known to establish trusts for the care of their graves, *see, e.g.*, MCGOVERN ET AL., *supra* note 35, § 13.7, at 555, and a testator might similarly bequeath to unborn beneficiaries in order to induce them to honor her memory—behavior by beneficiaries that could also be described as a limited form of social "service." For a broader philosophical discussion of this aim, see CARL L. BECKER, *The Uses of Posterity, in THE HEAVENLY CITY OF THE EIGHTEENTH CENTURY PHILOSOPHERS* 119 (1932).

53. This insight is, once again, remarkably venerable. Lord Hobhouse made the point over a century ago when he opined that:

A clear, obvious, natural line is drawn for us between those persons and events which the Settlor knows and sees, and those which he cannot know or see. Within the former province we may trust his natural affections and his capacity of judgment to make better dispositions than any external Law is likely to make for him. Within the latter, natural affection does not extend, and the wisest judgment is constantly baffled by the course of events.

HOBHOUSE, *supra* note 2, at 188. For a recent recapitulation, see GULLIVER, *supra* note 2, at 14-16. *But see infra* text accompanying note 145.

54. 2 BLACKSTONE, *supra* note 23, at *10.

freedom of testation as a natural right have taken care to cabin it within some bounds. For the Florida Supreme Court, the right is "held subject to the fair exercise of the power inherent in the State to promote the general welfare of the people . . ."⁵⁵ Natural rights thus can appear to have natural limits at the point where they overstep the bounds of general welfare⁵⁶—as, for instance, when a future interest becomes "highly absurd and inconvenient." Still, such hedging could be viewed as tantamount to abandoning the concept of natural law. One is hard pressed to discern how nature bounded by utility differs, other than cosmetically, from utility bounded by itself.⁵⁷

Professor Simes's simple suggestion that persons wish to give effect to the wills of their fellows appears least convincing in connection with future interests. To the extent that this willingness stems from piety, such ties of devotion will bind only the generation that knew the testator.⁵⁸ Nor will the opportunity to elaborate their own future interests commonly incline persons to enforce those of others, for the desire to create future interests within any one generation does not (at least today) appear to be widespread.⁵⁹

This leaves only the productivity-incentive theory of testamentary freedom to support an unlimited right to bequeath future interests. Other ideological girders crumble under the weight of futurity. Nevertheless, the superstructure, however wobbly, still stands. All else being equal, the freedom to create future interests would remain preferable to its restriction, given the added wealth such freedom could beget.⁶⁰

55. *Shriners Hosps. for Crippled Children v. Zrillic*, 563 So. 2d 64, 68 (Fla. 1990) (quoting *Golden v. McCarty*, 337 So. 2d 388, 390 (Fla. 1976)). Similarly, in Wisconsin, freedom of testation is held to be "an inherent right *subject only* to reasonable regulation by the Legislature." *Nunnemacher v. State*, 108 N.W. 627, 630 (Wis. 1906) (emphasis added); see also *In re Ball's Estate*, 141 N.W. 8, 10 (Wis. 1913).

56. E.g., David Lyons, *Utility and Rights*, in *ETHICS, ECONOMICS, AND THE LAW: NOMOS XXIV* 107, 117 (J. Roland Pennock & John W. Chapman eds., 1982) [hereinafter *ETHICS*].

57. For discussions of this conundrum, see Alan Gewirth, *Can Utilitarianism Justify Any Moral Rights?*, in *ETHICS*, *supra* note 56, at 158; Leland B. Yeager, *Rights, Contract, and Utility in Policy Espousal*, 5 *CATO J.* 259 (1985).

58. On this basis, Adam Smith criticized entails: "But tho' this piety to the deceased and regard to the will of the testator inclines us to dispose of his goods and obey his will for some time after his death, yet we do not naturally imagine that this regard is to last for ever. In a few years, often in a few months, our respect for the will of the testator is altogether worn off. A man who died 100 years ago, his will is no more regarded than if he had never lived." SMITH, *supra* note 1, at 65.

59. It would appear that most future interests nowadays are created in order to exploit extraneous tax advantages (retention of both spouses' estate tax credits and, to the extent still available, generation skips) rather than to achieve distributive ends. For anecdotal and empirical evidence, see MORRIS & LEACH, *supra* note 10, at 17-18; Dukeminier, *Uniform Rule*, *supra* note 4, at 1045-46; Fellows, *supra* note 4, at 651-54; Leach, *supra* note 2, at 1140-42; see also *infra* note 204. But see SIMES, *supra* note 2, at 58 ("[A] policy in favor of permitting people to create future interests . . . also accords with human desires.").

60. In examining the utility of freedom to bequeath future interests in property, John Stuart Mill observed that "persons have occasionally exerted themselves more strenuously to acquire a fortune from the hope of founding a family in perpetuity," but he added that this

All else, however, is not equal. Future interests can exact real costs, costs that lawmakers must weigh against the benefits of permitting testators to bequeath them. Still, the nature of those costs requires careful analysis. A cornerstone of the orthodox critique of future interests law is that perpetuities must be avoided in order to preserve a parity of property rights over time. If lawmakers were to indulge one generation's desire to control property ad infinitum, they would deprive subsequent generations of the like opportunity, because later comers would inherit their property subject to restrictions already imposed. "[T]o come most nearly to satisfying the desires of peoples of all generations, we must strike a fair balance between unrestricted testamentary disposition of property by the present generation and unrestricted disposition by future generations," insisted Professor Simes.⁶¹ Freedom of testation must be temporally rationed lest those alive at any one time apply "the power of alienation . . . to its own destruction."⁶²

This argument, which speaks to the longevity of dead hand control irrespective of its qualitative attributes, is in fact quite venerable. Critics voiced it to attack the power to create entailed estates from at least the seventeenth century.⁶³ But the argument truly had merit only prior to the industrial age, when a fixed stock of land represented the main source of wealth in society. If wealth is a constant, and one generation monopolizes the benefits of bequeathing it, subsequent generations suffer a clear cost in

consideration was not of great weight because "the incentives in the case of those who have the opportunity of making large fortunes are strong enough without it." 1 MILL, *supra* note 25, at 221; cf. Peter J. Wiedenbeck, *Missouri's Repeal of the Clafin Doctrine—New "Views" of the Policy Against Perpetuities?*, 50 Mo. L. Rev. 805, 829-30 (1985) (suggesting that the power to bequeath future, as opposed to present, interests has a nominal impact on incentives to produce).

61. SIMES, *supra* note 2, at 59. The argument reappeared in LEWIS M. SIMES & ALLAN F. SMITH, *THE LAW OF FUTURE INTERESTS* § 1117, at 13 (2d ed. 1956); Lewis M. Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707, 723 (1955).

62. MORRIS & LEACH, *supra* note 10, at 17. For other statements of this proposition, see, for example, 1 RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS 8 (1983); GREEN, *supra* note 38, at 174; SIDGWICK, *supra* note 8, at 102-03.

63. SMITH, *supra* note 1, at 69-70, 468; ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1776), reprinted in 39 GREAT BOOKS OF THE WESTERN WORLD 166 (Robert M. Hutchens ed., W. Benton 1952) [hereinafter *WEALTH OF NATIONS*]; Henry Home (Lord Kames), *Considerations Upon the State of Scotland with Respect to Entails*, in WILLIAM C. LEHMANN, HENRY HOME, LORD KAMES, AND THE SCOTTISH ENLIGHTENMENT 327, 331 (1971) (ms. 1759). In the seventeenth century, Francis Bacon focused his criticism of entails on one particular cost to subsequent generations—their power to extract social services from their children: "the Land being so sure tyed upon the heire as that his Father could not put it from him, it made the Sonne to bee disobedient, negligent, and wastfull; often marrying without the Fathers consent, and to grow insolent in vice, knowing, that there could be no checke of disinheriting him." FRANCIS BACON, *The Use of the Law, in THE ELEMENTS OF THE COMMON LAWES OF ENGLAND* 54 (photo. reprint 1978) (n.p., 1630); see also 2 BLACKSTONE, *supra* note 23, at *116; *infra* note 162.

the loss of those same benefits.⁶⁴ That cost, borne forever, must outweigh the benefit to the one generation that imposes it. But in modern times, when each generation can produce its own wealth, the loss of opportunity to bequeath *prior* wealth does not clearly crowd later comers to their overall detriment.⁶⁵ At one extreme, a legal regime *forbidding* future interests gives each generation the opportunity to bequeath all wealth, old and new, but with the shortest duration of control; at the other extreme, a legal regime permitting *unlimited* future interests gives each generation the opportunity to bequeath new wealth only, but with the longest duration of control; and each generation will also have the maximum incentive to produce new bequeathable wealth. In a world of dynamic wealth, *both* regimes (and every one in between) achieve a state of intergenerational equilibrium. The optimal mix of opportunities to bequeath is not plainly apparent.

Future interests can carry additional costs, however. And it is at this juncture that a closer study of the *qualities* of dead hand control becomes important.

II. THE DEAD HAND: QUALITATIVE VARIATIONS

A. Use Restrictions

One variation of dead hand control that a testator might seek to impose is a restriction on the use of property, extending into the future. Use restrictions can take several forms. Within the realm of legal estates in property (that is, property interests held out of trust), testators can impose use restrictions by attaching a real covenant to a gratuity or by making the property defeasible upon violation of the prescribed limitation.⁶⁶ Alternatively, a testator could establish a use restriction through the medium of a trust, making an outright transfer to a trustee but fixing rules for the use by the beneficiaries of trust distributions. A trust instrument thus could stipulate that the trustee make payments to the beneficiary only for certain

64. Lord Kames conceptualized the problem in this pre-modern context: "noblemen and gentlemen . . . secure every purchase [of land] by an entail: and thus acquisition will be made generation after generation, till there be not left a single inch of land to be purchased." Home (Lord Kames), *supra* note 63, at 329.

65. Cf. Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1257-58 (1985) (criticizing Simes's argument as "either tautological or so vague as to be meaningless"); Epstein, *supra* note 8, at 704-05 (criticizing Simes's argument on the ground that intergenerational parity is unachievable).

66. Defeasible fees in real property are valid everywhere, whereas gifts of personalty conditioned on use for a specific purpose have often, though not always, been sustained. John L. Garvey, *Revocable Gifts of Personal Property: A Possible Will Substitute*, 16 CATH. U. L. REV. 119, 149-52 (1966); see also RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 31.2 (Tentative Draft 1988).

expenses—say, medical care, or education, or housing—as opposed to providing the beneficiary with an unrestricted income stream.⁶⁷

From the imposition of use restrictions, testators may derive satisfaction that will spur them to productive activity. Such restrictions may gratify the testator personally by ensuring that her property is used in ways she herself would prefer. The thought that a beloved piece of property or hard-earned savings might, from the testator's perspective, be ruined or squandered could conceivably appall her. Alternatively, the testator could be moved by paternalism to impose a use restriction. Through this means, she could influence her beneficiary's consumption decisions (and perhaps, in the long run, consumption preferences) by subsidizing only certain goods. Such influence may be seen by the testator to be in her beneficiary's own interest, and for the paternalistic testator that too is a value.⁶⁸

At the same time, use restrictions entail costs. When attached to legal estates in property, use restrictions limit marketability and productive use, thereby giving rise to a social cost.⁶⁹ A use restriction can also generate private costs, in that the beneficiary might prefer to spend his inheritance in ways other than those ordained by the testator.⁷⁰ When a use restriction

67. A rare variation of the use restriction is the "conduct restriction," whereby a testator requires the beneficiary to perform some extraneous conduct as a condition for receiving, or retaining, bequeathed property. "Trust income to A, so long as A abstains from the consumption of alcohol" would be an example. These sorts of private dead hand control also have analogues in the realm of public transfers. Governments sometimes redistribute property in kind (what economists call "merit goods"), for example, food stamps, or set eligibility conditions for cash redistributions that involve conduct rather than mere status, for example, unemployment benefits conditioned on job hunting.

68. For an economic analysis, see Robert A. Pollak, *Tied Transfers and Paternalistic Preferences*, 78 AM. ECON. REV., May 1988, at 240. For an analysis in connection with public redistributions, see S.C. Littlechild & J. Wiseman, *The Political Economy of Restriction of Choice*, 51 PUB. CHOICE 161 (1986), reprinted in JACK WISEMAN, COST, CHOICE AND POLITICAL ECONOMY 186 (1989). Conduct restrictions likewise operate to modify behavior in ways that the testator perceives to be in the beneficiary's best interest (although, again, the mandated behavior could conceivably gratify the testator personally).

69. Avoiding clogs on alienability was the earliest perceived policy against extended dead hand control. GRAY, *supra* note 2, § 268; MCGOVERN ET AL., *supra* note 35, § 13.2, at 505-06; SIMES, *supra* note 2, at 33-38; Everett Fraser, *The Rationale of the Rule Against Perpetuities*, 6 MINN. L. REV. 560 (1922). Use restrictions could also have a secondary social consequence (though probably a *de minimis* one), in that they raise the price of the good which the trust must be used to buy and lower the price of the good which the beneficiary would have bought otherwise, at the margin. Whether this small market distortion helps or harms other consumers is uncertain, however, for it will depend upon whether they prefer the good which the beneficiary was required to buy or the good she was prevented from buying. Still, by distorting the market, use restrictions will surely diminish *total* consumption utility. The purchase of certain goods (or behaviors mandated by a conduct restriction) could also have secondary social consequences, if they intrinsically benefit (for example, education) or harm society. To the extent goods or behaviors are socially harmful, they can, of course, be regulated otherwise.

70. Likewise, a conduct restriction may mandate behavior that the beneficiary prefers not to undertake. If the perceived cost of the behavior exceeds the value of the gratuity offered, the beneficiary will disclaim it.

fails to correspond with the beneficiary's own consumption preferences, his utility falls.⁷¹

When use restrictions attach to trusts, the associated social cost fails to arise.⁷² Assets poured into a use-restricted trust remain freely alienable in fee simple by the trustee, for the corpus is a revolving fund.⁷³ Accordingly, the dead hand will not hamper the invisible hand. But the private cost to beneficiaries will remain, assuming their consumption preferences differ from the consumption subsidies created by the trust instrument.

Where, then, does all of this leave us? Considered from the standpoint of wealth enhancement, a use restriction is of efficient duration where the marginal benefit to the testator of extending the restriction (that is, the extra amount of wealth she would be willing to pay to continue it) equals the marginal benefit to the beneficiary and to society of terminating the restriction (again, the extra amount that beneficiaries and society would pay to be rid of it). Obviously, one can offer no generalization about where this point should lie. The answer, even if empirically determinable, which it is not,⁷⁴ will vary from case to case. Still, several simple observations on the matter do spring to mind.⁷⁵

First, the total cost of a use restriction is bound on average to be greater when attached to a legal estate in property than when fastened to a trust. In the instance of a legal estate, the use restriction will impose social, as well as private, costs. At the same time, one cannot predict the relative worth to a testator of a use restriction imposed in or out of trust. To the extent that a testator strives only to modify the beneficiary's behavior, she should remain indifferent to the choice. For a few testators, however, particular pieces of property may have sentimental value, which could

71. The beneficiary can decrease the cost of a use restriction by diverting to other uses resources that he would on his own have devoted to the prescribed use. If in fact the beneficiary would have spent as much of his own funds on the prescribed use as is provided by the gratuity, then the restriction becomes costless from his point of view. Also, if the use restriction mandates purchase of some transferable good, enforcement may be difficult, in that the good can subsequently be traded for one the beneficiary prefers. (Use-restricted interests cannot simply be sold *ab initio*, however, for the use is limited to the named beneficiary. Cf. *infra* notes 107, 135-36, 155, and accompanying text.) One special sort of use restriction that might affirmatively *appeal* to some beneficiaries is a spendthrift provision, which, without pinpointing how an income stream must be spent, still protects against general creditors' claims by preventing immediate alienation of the corpus. A spendthrift trust accordingly can be "used" only for *periodic* consumption. A restriction of this sort raises independent and complex policy concerns and so will not be addressed in this Article. For discussions, see *infra* note 172.

72. *But see supra* note 69.

73. This assumes that the testator imposes no restriction on the sale of particular trust assets. The social costs of investment restrictions are addressed *infra* notes 101-24 and accompanying text.

74. To the extent that use restrictions burden as yet unborn beneficiaries, the costs they impose are prospectively unquantifiable. Nor is the amount that "society" would be willing to pay to avoid a use restriction practically determinable.

75. For a related discussion, see COOTER & ULEN, *supra* note 25, at 165-68.

increase their subjective preference for a legal use restriction and compensate to some degree for its added social cost.⁷⁶

Second, use restrictions (of all sorts) are apt to grow marginally more costly with the passage of time, as the state of the world diverges from the testator's expectations.⁷⁷ Simultaneously, the marginal benefit to the testator of imposing the restriction should diminish over time, dropping off sharply after the first or second generation. These generations encompass the beneficiaries with whom the testator is personally acquainted; she will presumably have less interest in modifying the behavior of future generations of persons unknown to her.⁷⁸ And even when providing for the unborn, a testator should feel incrementally closer ties to near descendants whom she can readily envision (such as unborn grandchildren) than to more distant ones, with whom she can scarcely forge even metaphysical bonds.⁷⁹

Given these dynamics, we can assert with confidence that efficiency will dictate *some* finite limit on the life of a use restriction. No matter how large a value the testator places on a use restriction, mounting marginal costs will eventually overwhelm it. It seems doubtful that total wealth will in *any* instance be maximized by giving effect to a use restriction of infinite duration.

Still, perceiving an efficient duration for use restrictions is one thing; imposing it is another. Should lawmakers place mandatory limits on (or otherwise regulate) the longevity of use restrictions in order to enhance total wealth? Is this an appropriate area for public intervention into private affairs? Ordinarily, neoclassical economics tells us, the decisions of private

76. The testator's concern, in other words, might not be (only) that the *beneficiary* use his inheritance in a certain way, but that *Blackacre itself* be used in a certain way. How this would affect the subjective worth of a use restriction is uncertain. It has been conjectured, however, that sentimentality toward property is unusual in the United States today. John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 737-38 (1988).

77. Whether costs borne by future generations ought to be *discounted* (at the so-called Social Discount Rate) is an interesting and unsettled question that we can hardly answer definitively—or even tentatively. On the one hand, were the testator to set aside sums now to compensate future generations for use restrictions that saddle them with costs, one could readily conclude that future costs *should* be discounted. By the time designated sums are paid to future generations, they will have appreciated in value, because in our society investments tend to earn a positive, inflation-adjusted rate of return. See, e.g., WILLIAM A. KLEIN & JOHN C. COFFEE, JR., *BUSINESS ORGANIZATION AND FINANCE* 278-97 (4th ed. 1990). On the other hand, when no actual sums are set aside and we are simply comparing costs and benefits, it is less easy to conclude that benefits to the present generation are worth more than costs to future ones. For discussions of the problem of social discounting, see DAVID COLLARD, *ALTRUISM AND ECONOMY* 159-61 (1978); DEREK PARFIT, *REASONS AND PERSONS* 480-86 (1984).

78. See 2 F.W. TAUSSIG, *PRINCIPLES OF ECONOMICS* 302 (4th ed. 1939); Ellickson, *supra* note 12, at 736. Again, this analysis also pertains to conduct restrictions.

79. Even in cases where the value a testator places on a use or conduct restriction stems purely from personal moral concerns rather than the testator's paternalistic connection with the beneficiary, or from concern for the property itself, the value would still probably drop over time, given the tendency of persons to discount benefits that are deferred to the future.

economic actors require no regulation at all. The market itself ensures that property will be put to its most efficient use. So long as all interested parties are perfectly free to bargain over ownership and use, the law need not intrude on their autonomy. Only market imperfections call for legal regulation in order to increase efficiency.⁸⁰

Use restrictions do in fact involve market imperfections, thereby justifying legal regulation of this variety of dead hand control.⁸¹ When a testator creates a use-restricted interest out of trust that clogs alienability, society as a whole suffers from the resulting suboptimal use of resources. If the persons who bear this cost could somehow coordinate their efforts, they would bargain with the testator, offering her a payment to lift the restriction. But when the harm flowing from the restriction is spread so widely, bargaining becomes infeasible due to rising transaction costs. Left to its own devices, the market fails.

Nor will the market dependably communicate to a testator the *private* cost borne by beneficiaries when a use restriction attaches to an interest, whether in or out of trust. No "bargaining" can occur when a testator extends a true gratuity, for the testator's aim in the transaction is to improve the *beneficiary's*, not her own, position. Were the beneficiary (as opposed to society) to offer the testator a rebate to release a use restriction, the testator would always refuse: coming from the person whom the testator seeks to benefit, such a rebate would *reduce* the testator's utility by diminishing the amount received by the beneficiary.⁸² Optimality is here impeded not by barriers to coordination, but by barriers to market signals interposed by paternalism.⁸³ Instead of bargaining, however, the beneficiary

80. See generally COOTER & ULEN, *supra* note 25, at 43-51; Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1 (1982).

81. *But cf.* Epstein, *supra* note 8, at 705 ("The rule against perpetuities and its kindred rules are not directed toward any kind of externality."). This may be technically accurate, in that a testator, as absolute owner, could simply consume her property without "cost" to others. Nevertheless, one component of a use- or conduct-restricted gift, namely the restriction, does impose a cost that the testator does not bear and that the beneficiary (and society) would like to avoid. See also A.I. Ogus, *The Trust as Governance Structure*, 36 U. TORONTO L.J. 186, 214-16 (1986) (positing an external cost if the testator's property right is not deemed absolute).

82. To the extent that bequests are a quid pro quo for social services, however, it remains possible that some bargaining could take place between testator and beneficiary. *But see supra* note 31.

83. Paternalism is indeed a classic source of market failure, precisely because it ignores market signals (the proverbial screams of the dissatisfied child). The phenomenon is sometimes parodied by transplanting it into a commercial context, where it does not occur naturally: thus one occasionally finds as a denizen of theatrical productions the "paternalistic salesman" who refuses to sell goods to a buyer because he does not "need" them. See WEALTH OF NATIONS, *supra* note 63, at 7. For related economic discussions, see COLLARD, *supra* note 77, at 122-39; POLLAK, *supra* note 68, at 242-43; *cf.* GARY S. BECKER, A TREATISE ON THE FAMILY 277-306 (rev. ed. 1991) (arguing that altruism can serve as an efficient substitute for bargaining in certain situations).

could try to "reason" with the testator, communicating the extent of, and the justifications for, his displeasure with the use restriction, in an effort to move the testator's view of what is best for him closer to his own.⁸⁴ Such a process of communication may lead the parties closer to optimality, but it is not a perfect substitute for bargaining: even the informed testator may not see eye to eye with the beneficiary over how an inheritance would best be spent if their disagreement stems from different values rather than misunderstanding. When a use restriction covers beneficiaries as yet unborn, these difficulties are further compounded by a barrier to coexistence; unborn beneficiaries of a future interest can neither bargain *nor* reason with the testator.⁸⁵ In short, absent legal regulation of some sort, testators can be expected to prolong use restrictions beyond the (efficient) limits they would otherwise agree to, were the parties negotiating in a commercial context.⁸⁶

If we substitute for the goal of wealth maximization a broader (albeit vaguer) concern for social welfare, our conclusion that use restrictions merit regulation would remain unchanged. As earlier outlined, the testator's insights into the particular needs of her family can serve as a justification for the right to bequeath.⁸⁷ Under that theory, use restrictions that are subjectively costly could still be defended as conducive to the greater good of beneficiaries.⁸⁸ No such argument will offer refuge to a use-restricted

84. Here, however, information and transaction costs may be high. Given that unmaturing wills are private documents, and given cultural taboos against enquiry and discussion, the beneficiary may not learn what provision the testator proposes to make for him until the testator's death, when "reasoning," if ever culturally feasible, becomes physiologically impossible.

85. Lord Hobhouse saw the point quite early. He questioned the wisdom of "leav[ing] to landowners the large power they now possess of remaining the owners of property after they are dead, and can no longer be influenced by the demands and the opinions of the living." HOBHOUSE, *supra* note 2, at 179. For modern discussions, compare POSNER, *supra* note 12, § 18.6, at 512; Ellickson, *supra* note 12, at 734-37; and Stewart E. Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615, 634-44 (1985). Similar arguments have also been advanced to justify regulation of the exploitation of nonrenewable resources. See TALBOT PAGE, *CONSERVATION AND ECONOMIC EFFICIENCY* (1977); *RESPONSIBILITIES TO FUTURE GENERATIONS* 40, 50-52, 154, 161-62 (Ernest Partridge ed., 1981).

86. By comparison, many commentators have urged that the Rule against Perpetuities should not apply to commercial transactions, precisely because these transfers *are* the subject of bargaining. 6 AMERICAN LAW OF PROPERTY § 24.56, at 144-45 (A. James Casner ed., 1952); MCGOVERN ET AL., *supra* note 35, § 13.8, at 561; MORRIS & LEACH, *supra* note 10, at 226. The Uniform Statutory Rule against Perpetuities takes this approach. UNIF. STAT. R. AGAINST PERPETUITIES § 4, 8A U.L.A. 377 (Supp. 1992).

87. See *supra* notes 38-48 and accompanying text.

88. See *supra* text at note 68. The defense hinges, however, on an acknowledgment of the moral legitimacy of paternalism. One could of course argue that use and conduct restrictions are abhorrent from a moral standpoint because they invade the beneficiary's autonomy. For Existential philosophers, making hard choices (such as the use of one's resources) is the stuff—or even the spice—of life. To deny the beneficiary the *angst* of hard choices would be to deprive him of the central aspect of the human condition. MARTIN HEIDEGGER, *BEING AND TIME* 157-59 (John Macquarrie & Edward Robinson trans., Harper & Row 1962) (1927); for

future interest, however. Created under conditions of ignorance rather than knowledge, these restrictions perform are hit or miss. As a consequence, use-restricted future interests should tend to reduce both the wealth and welfare of beneficiaries. Regulation of use-restricted future interests can again be premised on the inference that the harm flowing from arbitrary constraints on the use of wealth outweighs the testator's gratification in imposing such constraints.⁸⁹

There remains a final, if paradoxical, argument for legal regulation of use restrictions—namely, that such regulation serves to effectuate the testator's own probable intent. When a testator ties a use restriction to a legal estate or to a trust, she may not immediately appreciate that changing conditions could eventually render the restriction inexpedient (even from her own perspective) to beneficiaries. In retrospect, the testator might prefer that the restriction be removed. By accomplishing that result by way of state intervention, lawmakers preserve the testator from "error costs" incurred when she thoughtlessly imposes inflexible use restrictions on future interests.⁹⁰

Professor Jonathan Macey has criticized this justification for regulating dead hand control as embracing "a peculiar form of paternalism."⁹¹ Pater-

a classic utilitarian condemnation of paternalism, see JOHN STUART MILL, ON LIBERTY 93 (Curran V. Shields ed., Bobbs-Merrill Co., Inc. 1956) (1859). Lord Hobhouse argued against dead hand control, inter alia, on the ground "that people are the best judges of their own concerns; or if they are not, that it is better for them, on moral grounds, that they should manage their own concerns for themselves." HOBHOUSE, *supra* note 2, at 184-85; see also JOHN C. GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY § 124 (l) & (o), at 118, 120 (2d ed. 1895). For modern discussions of the paternalism-autonomy problem, see, for example, GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY (1988); Donald H. Regan, *Justifications for Paternalism*, in THE LIMITS OF LAW: NOMOS XV 189 (J. Roland Pennock & John W. Chapman eds., 1974); for a Critical Legal Studies perspective, see Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 588-90, 638-49 (1982) (noting a tension between the need for intervention and its tendency to perpetuate pre-existing hierarchies). Suggesting that *private* paternalism (as here) may be more easily justified than *state* paternalism, see Tziporah Kasachkoff, *Paternalistic Solicitude and Paternalistic Behavior: Appropriate Contexts and Moral Justifications*, in FREEDOM, EQUALITY, AND SOCIAL CHANGE 79, 81-82 (Creighton Peden & James Sterba eds., 1989).

89. Simes made the point in connection with conduct restrictions. SIMES, *supra* note 2, at 62-63.

90. See the discussions in POSNER, *supra* note 12, §§ 18.3 - .4, at 508-10; Oigus, *supra* note 81, at 202-04, 215. Judge Posner asserts that many testators intend implicitly that restrictions, even when stated inflexibly, be subject to deviation when circumstances change. In other words, their *initial* intent is that such restrictions not necessarily apply indefinitely (even when the will says otherwise). Yet, it seems far more likely, if not virtually certain, that testators fail to make explicit provisions for subsequent deviation not because they accept the possibility of deviation implicitly, but because they fail to anticipate the need for such deviation. See 4A AUSTIN W. SCOTT, THE LAW OF TRUSTS § 399.2, at 490 (William F. Fratcher ed., 1987); Austin W. Scott, *Deviation from the Terms of a Trust*, 44 HARV. L. REV. 1025, 1027 (1931); see also Lord Coke's observation in *Roberts v. Roberts*, 80 Eng. Rep. 1002, 1003 (K.B. 1613) ("the testator . . . never once dreamt or thought of this . . .").

91. Jonathan R. Macey, *Private Trusts for the Provision of Private Goods*, 37 EMORY L.J.

nalistic it is, and peculiar too, though its peculiarity stems from aspects of the problem different from the one Macey identifies.⁹² According to Macey, “[p]eople forming trusts clearly will take the possibility of unforeseen contingencies into account when creating the trust.”⁹³ If they still prefer to impose the restriction “*after the possibility of error has been factored into the individual’s utility calculation*, then a basic respect for property rights would require that settlors be able to establish trusts as they see fit.”⁹⁴ In this view, state paternalism is unwarranted (or peculiar) because the testator in these circumstances is behaving rationally.

That assumption, however, is problematic. Testators may not at all “clearly” recognize the implications of their action when they impose use restrictions. They might very well intend a different result in hindsight. The difficulty, which both cognitive psychologists and down-to-earth estate planners have noticed, is that human persons often forget that they inhabit a changing world. They tend, perhaps systematically, to underestimate the likelihood that inflexible provisions for the future, including use restrictions, will fail to suit evolving circumstances.⁹⁵ To protect testators from this

295, 307 (1988). The rationale has also been criticized for the indeterminacy of the standard of unforeseeability that it would require courts to apply. Alexander, *supra* note 65, at 1261-62.

92. One peculiarity is simply the fact that state paternalism is here being posited to temper the testator’s *private* paternalistic impulses, as reflected in use restrictions. See *supra* text accompanying note 68. Thus, it is actually a sort of meta-paternalism!

93. Macey, *supra* note 91, at 307.

94. *Id.* (emphasis in original).

95. W. BARTON LEACH & JAMES K. LOGAN, *CASES AND TEXT ON FUTURE INTERESTS AND ESTATE PLANNING* 241-42 (1961); THOMAS L. SHAFFER, *DEATH, PROPERTY, AND LAWYERS: A BEHAVIORAL APPROACH* 123-24 (1970) [hereinafter *DEATH, PROPERTY, AND LAWYERS*]; THOMAS L. SHAFFER & CAROL A. MOONEY, *THE PLANNING AND DRAFTING OF WILLS AND TRUSTS* 13-14 (3d ed. 1991); Paul B. Sargent, *Drafting of Wills and Estate Planning*, 43 B.U. L. REV. 179, 191-92 (1963). The phenomenon was spotted quite early, and was cited to justify the Rule against Perpetuities in the seminal *Duke of Norfolk’s Case*, where Lord Chancellor Nottingham observed that testators who established perpetual estates “do fight against God, for they pretend to such a Stability in human Affairs, as the Nature of them admits not of . . .” *Duke of Norfolk’s Case*, 22 Eng. Rep. 931, 949 (Ch. 1682). Cognitive psychologists have posited a number of heuristic devices that help to explain such behavior. By the process of *decision framing*, persons create simplified analytical models (e.g., temporal stasis) to evaluate decisions in order to reduce cognitive strain. And by the process of *anchoring*, persons make predictions by focusing on a single clue or circumstance (e.g., current needs) and ignoring other ones. On the cognitive psychology of decision making and predictive bias, see Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 PSYCHOL. REV. 237 (1973); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453 (1981); Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251 (1986), reprinted in *THE LIMITS OF RATIONALITY* 60 (Karen Schweers Cook & Margaret Levi eds., 1990). The psychological defense mechanism of “denial” may also be involved: persons may *resist* projecting into the future, for to do so they must contemplate their old age or death. See ANNA FREUD, *THE EGO AND THE MECHANISMS OF DEFENSE* 133-34 (Cecil Baines trans., International Universities Press, Inc.

failing would not be to indulge in an unusual form of paternalism. The law elsewhere operates to protect persons from the consequences of other recognized impairments to rational judgment, such as impulsiveness, that can cause them to act in ways they would subsequently regret. Though often implicit, state paternalism of this sort abounds.⁹⁶

What is truly peculiar here is the context. The error cost that a testator incurs in overlooking or underestimating the possibility of change comes to light *only after she is dead*. Yet the dead hand (and mind) has presumably lost its capacity to regret!⁹⁷ Ordinarily, error costs could be quantified as the amount the testator would be willing to pay to release a bequest from an ill-conceived restriction. The concept becomes meaningless once the testator ceases to exist. To premise legal regulation of the dead hand on the basis of paternalism thus appears logically, and economically,⁹⁸ flawed. The state simply has no reason to take under its wing the disembodied, for they can no longer benefit from mortal assistance.⁹⁹ But that, of course, is

1966) (1936). Cognitive psychologists have also noticed a general tendency for persons to overestimate the likelihood of positive occurrences, which may be related to denial. This bias could also adversely affect estate planning capabilities in a systematic way. For a discussion, see Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806 (1980). For an early anticipation, see WEALTH OF NATIONS, *supra* note 63, at 45-46. Finally, use-restriction planning errors may also be induced by *cultural* phenomena: Americans often tend to focus on providing a college education for their beneficiaries in preference to providing prerequisite support for them during their minority. Professor Shaffer calls this the "American Dream" syndrome. DEATH, PROPERTY, AND LAWYERS, *supra*, 97-98, 128-30; see, e.g., *In re Estate of Kerber*, 336 N.Y.S.2d 400 (Sur. Ct. 1972). For recent surveys of the psychology of decision making and of its implications for legal policy, see GEORGE AINSLIE, *PICOECONOMICS* (1992); JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* (1983); Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989); Paul J. Heald & James E. Heald, *Mindlessness and Law*, 77 VA. L. REV. 1127 (1991); Gregory S. Kavka, *Is Individual Choice Less Problematic than Collective Choice?*, 7 ECON. & PHIL. 143 (1991); Jozef Kozielski, *Towards a Theory of Transgressive Decision-Making: Reaching Beyond Everyday Life*, 70 ACTA PSYCHOLOGICA 43 (1989); Vernon L. Smith, *Rational Choice: The Contrast Between Economics and Psychology*, 99 J. POL. ECON. 877 (1991); Thomas S. Ulen, *Cognitive Imperfections and the Economic Analysis of Law*, 12 HAMLINE L. REV. 385 (1989).

96. See generally Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 786-98 (1983) (noting also several other potential justifications for paternalism); Kennedy, *supra* note 87, at 624-38; P.A. Diamond, *A Framework for Social Security Analysis*, 8 J. PUB. ECON. 275 (1977); Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1404-18 (1985).

97. Oddly enough, some judges have failed to grasp the point. Upon concluding that a deceased testator had run afoul of the Rule against Perpetuities, Lord Denedin added sternly: "and I am afraid he must take the consequences." *Ward v. Van der Loeff*, 1924 App. Cas. 653, 667 (appeal taken from Ch.). No paternalist, he!

98. The risk of regret here imposes no "cost" on the testator, for it does not affect her willingness to produce while she is alive, and she is now oblivious to the harm she has caused. Had she anticipated the harm, she could, of course, have taken steps to avoid it by incorporating greater flexibility into her estate plan.

99. The idea is accepted in the natural, if not the legal, world. See PARENTAL CARE IN

not to suggest that living persons cannot so benefit. This analysis in no wise undermines our earlier conclusion that legal regulation of use restrictions serves to compensate for market imperfections and generally protects the welfare of beneficiaries.¹⁰⁰

B. Investment Restrictions

Another way in which the dead hand might strive to assert continuing control is by leaving instructions for the investment and management (as opposed to the spending) of bequeathed property. When a testator places a gratuity in trust, that action in itself effects an investment restriction. Instead of giving beneficiaries carte blanche to administer the bequest themselves, that responsibility will now shift to a third party, the trustee. In addition, the trust instrument could constrain the trustee to invest the corpus only in certain ways. Instructions for investment could also adhere to a legal estate, through the device of a forfeiture condition.¹⁰¹ In most such cases, the testator's motive would presumably be a paternalistic regard for the pecuniary interests of her beneficiaries, on the assumption that she knows better than they how to make the property most remunerative.¹⁰²

In one respect, the problem of investment restrictions is structurally analogous to the problem of use restrictions. Both involve decisions concerning the property that may diminish its value to beneficiaries. Beneficiaries who wish to invest inherited property in a manner contrary to a decreed restriction might be willing to pay the testator to waive the restriction, if only they could strike a bargain. As in the case of use restrictions, legal regulation of investment restrictions can function to improve efficiency by redressing market imperfections.¹⁰³

In another respect, however, the problems differ. If one beneficiary were given the right to ignore a use restriction, the exercise of that right could

MAMMALS 147-49 (David J. Gubernick & Peter H. Klopfer eds., 1981) (discussing the termination of maternal care). A possible rejoinder to this argument is that the testator, while alive, *wishes* to be prevented from making regrettable use restrictions, because she knows (like Ulysses) that if she is permitted to do so she will succumb to the temptation. Here, the ostensible justification for legal regulation is not state paternalism, but rather self-paternalism. (On this conceptual distinction, see, for example, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1113-14 (1972).) See generally JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 36-111 (1979) (discussing "imperfect rationality," the dilemma of knowing that one is susceptible to temptation). It is, however, scarcely clear that testators recognize the need to be protected from their own instincts in the context of estate planning.

100. See *supra* notes 81-89 and accompanying text.

101. See *supra* note 66.

102. But see *infra* note 105. Again, a parallel can be drawn to certain public transfers. Transfers of wealth under the Social Security Act are administered through a series of trust funds, for example. ARTHUR ABRAHAM & DAVID L. KOPELMAN, *FEDERAL SOCIAL SECURITY* 137-39 (1979).

103. See *supra* notes 81-86 and accompanying text.

have no adverse impact on other beneficiaries; a use restriction encumbers *distributions*, which are serially independent.¹⁰⁴ An investment restriction, by contrast, encumbers the *corpus*. Restrictions that apply to the handling of the corpus at any one time have distributive consequences not only for the current beneficiary, *but for all subsequent serial beneficiaries as well*. This interdependence could leave beneficiaries at odds over managerial preferences; while some might pay to extinguish an investment restriction, others, happy with the dead hand's edicts, might pay to preserve it.

What, then, can be said about the wealth consequences of investment restrictions? Analysis of the matter will vary, depending on the sort of restriction individual testators seek to impose. If a testator were to specify that future generations preserve a particular asset—say, a quarry, or shares in a named enterprise—as the source of their income, then surely the passage of time would ultimately render all beneficiaries displeased with the choice. Nothing lasts forever: an oil company may seem a shrewd investment today, but where will it be when the internal-combustion engine goes the way of the horse? Such restrictions would also leave a shadow legacy of social costs.¹⁰⁵

By contrast, when a testator exerts managerial control only to the extent of decreeing that the corpus of a gratuity shall stand in trust, a line of unborn beneficiaries probably would not pay a positive net sum to remove the restriction. In such a case, the testator has not undertaken rigidly to dictate a mode of investment irrespective of changing conditions. Instead, she has delegated management of the corpus to a fiduciary. Investment decisions accordingly will remain timely, for they will be made on the spot by a living hand.¹⁰⁶

Of course, certain beneficiaries might still prefer to receive their gratuities out of trust.¹⁰⁷ Some, as a matter of taste, might derive satisfaction from

104. See *supra* notes 71, 74. This assumes that each beneficiary will choose to consume the entire amount of the distribution offered, no matter what the restriction on its use.

105. If the testator requires that beneficiaries retain a particular enterprise, or shares in an enterprise, then the market for enterprise ownership and control is disrupted. On the problem of enterprise control, see generally, for example, RONALD J. GILSON, *THE LAW AND FINANCE OF CORPORATE ACQUISITIONS* 250-498 (1986); KNIGHTS, RAIDERS, AND TARGETS: *THE IMPACT OF THE HOSTILE TAKEOVER* (John C. Coffee, Jr. et al. eds., 1988); John C. Coffee, Jr., *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance*, 84 COLUM. L. REV. 1145 (1984). See also *supra* note 69. The testator's motive here might not be paternalistic. She could be moved by a personal desire to ensure that an enterprise or other property for which the testator feels a sentimental attachment will continue to be owned by members of her family. Cf. *supra* note 76.

106. Of course, a trustee never exercises dead hand control. A corporate fiduciary can cheat death altogether. And when an individual trustee dies (or resigns), she is replaced by a successor trustee. 2 SCOTT, *supra* note 90, §§ 103-106.3, at 87-102.

107. Beneficiaries preferring their interests out of trust can (absent a spendthrift clause or other impediment) simply sell their trust interests for cash. The transaction cost accordingly sets the maximum amount beneficiaries would be willing to pay to avoid an investment restriction. Cf. *supra* note 71.

management and direct possession of financial assets. They might enjoy the simple pleasures of thumbing the financial pages or (like Silas Marner) delight in running fistfuls of gold between their fingers.¹⁰⁸ Others, as a matter of interest, might bank on the superiority of their own managerial talents. And still others, however confident of their personal abilities, might balk at the price of delegation—for fiduciary relationships do entail costs. Directly, trustees demand fees for their services, fees that do not burden legal interests in property.¹⁰⁹ And indirectly, delegation to a trustee involves agency costs, in that the trustee has an incentive to favor her own interests over those of beneficiaries.¹¹⁰

Standing alongside these beneficiaries will be others, however, who find profit in trust delegation. For some, the responsibility of tending to the corpus will seem a burden, from which the establishment of a trust could spare them. A trust also provides an opportunity for expert management of the corpus, thereby facilitating an efficient division of labor.¹¹¹ Even absent a mandate from the grave, many individuals choose to engage the services of professional fiduciaries on their own behalf. The proliferation of mutual funds well illustrates this phenomenon.

It is, however, as an accessory to a future interest that trust delegation becomes particularly appealing. Direct ownership of property by a line of beneficiaries involves its own costs. Out of trust, a beneficiary who wishes to convert bequeathed property must either gain the unanimous consent of his fellow beneficiaries (some of whom may remain unborn) or obtain a

108. See GEORGE ELIOT, *SILAS MARNER* 70 (Q.D. Leavis ed., Penguin Books 1967) (1861) ("But at night came his revelry: at night he closed his shutters, and made fast his doors, and drew forth his gold He spread them out in heaps and bathed his hands in them").

109. Considered historically, trusts have not in general been directly profitable to corporate fiduciaries, however. The trust departments of banks have often played a loss-leader function. Richard Boling, *Can Trust Profitability Be Meaningfully Measured?*, 119 *TR. & EST.*, Mar. 1980, at 43, 44.

110. Agency costs technically comprise the dollar equivalent of the following sum: (1) all self-interested behavior (shirking, stealing, etc.) by the fiduciary that is too expensive to prevent, (2) expenditures for monitoring the fiduciary to minimize such behavior, and (3) the cost of "bonding" devices which render the fiduciary's interests coincident to the beneficiaries' interests (e.g., basing fiduciary compensation on investment performance). On the problem of agency costs, see KLEIN & COFFEE, *supra* note 77, at 160-61; Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. FIN. ECON.* 305 (1976). For an early recognition of this problem in connection with trusts, see SIDGWICK, *supra* note 8, at 102. Agency costs are probably lower in a trust than in a corporation (or a government), because its principals are fewer and so have an incentive to monitor. If the principals are numerous, none may have an adequate inducement to warrant the cost of monitoring, and so the group may collectively succumb to "rational apathy." See MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* 9-16, 21-36, 163-65 & n.102 (Schocken Books 1971) (1965). For a further discussion of the agency costs of trusts, see Macey, *supra* note 91, at 315-21.

111. David R. Frazer, *Five Myths of Estate Planning*, 124 *TR. & EST.*, Dec. 1985, at 16, 18; Ogus, *supra* note 81, at 188.

court order to permit sale.¹¹² Either process involves obvious inefficiencies. And because impediments to marketability hinder transfers of property to their most efficient users, future interests created out of trust also impose a social cost.¹¹³

Even if the testator drafted around these problems by granting a serial power of sale and reinvestment in each possessory beneficiary, conflicts of interest could still arise. Given that the managerial decisions made by any one beneficiary will affect those later in line, most beneficiaries would probably prefer continuous fiduciary management, even at the cost of their own unfettered freedom, to reduce the danger that preceding beneficiaries would mismanage the corpus and leave them with nothing.¹¹⁴ In short, considered in isolation, a proviso that a future interest be held in trust, *even in perpetuity*, will likely appeal to most beneficiaries.¹¹⁵ And so long as a trustee has authority to invest as she in good faith sees fit, a trust also serves to avoid social costs.¹¹⁶

112. The distribution of managerial power among beneficiaries in a future interest chain is up to the testator. While the testator can decline to exert managerial control herself, she cannot avoid making some determination (whether by action or inaction) about how managerial power will be shared among multiple beneficiaries. Absent an expression of intent to the contrary, the common law grants each possessor in turn a power of control *other than* sale and reinvestment. The testator can by express provision modify these rights, for example, to create a serial, instead of a consensual, power of sale. See generally DUKEMINIER & JOHANSON, *supra* note 43, at 444-45; Candler S. Rogers, *Removal of Future Interest Encumbrances—Sale of the Fee Simple Estate*, 17 VAND. L. REV. 1437 (1964); J.A. Bryant, Jr., Annotation, *Court's Power to Order Sale of Property Subject to Legal Life Estate in Order to Relieve Economic Distress of Life Tenant*, 57 A.L.R.3d 1189 (1974).

113. See *supra* note 69 and accompanying text.

114. On this logic, beneficiaries would probably most prefer expert management by a corporate fiduciary. But management by *any* fiduciary (for example, the possessory beneficiary as trustee for all beneficiaries) would still seem preferable to management by a beneficiary bound by no fiduciary duty. See also *infra* note 117 and accompanying text.

115. For a different analysis, see Ellickson, *supra* note 12, at 736.

116. Professor Simes offered a qualification here: He perceived a social cost if trust administration guidelines preclude venture capital, a form of investment necessary to achieve "a higher and better civilization." SIMES, *supra* note 2, at 60-61. (This argument, though generally associated with Simes, also appeared in an earlier, lesser known essay. A. Anton Friedrich, *The Economics of Inheritance*, in 1 SOCIAL MEANING OF LEGAL CONCEPTS 27, 32-33 (Edmond N. Cahn ed., 1948).) Indeed, it has been asserted that as a *practical* (if not a legal) matter, risk capital will not emerge from a trust even when the testator *frees* the trustee from all managerial constraints, due to the traditional conservatism of trustees. George Downing, *The Duration and Indestructibility of Private Trusts*, 16 W. RES. L. REV. 350, 363-68 (1965). Yet, a restriction (*de facto* or *de jure*) against venture capital would not preclude risk investments undertaken, so to say, at one remove. A gratuity limited to low-risk investments could still include shares in blue-chip corporations with a diversity of divisions (some of which engage in "risky" ventures) or deposits in financial intermediaries, such as banks, that lend to entrepreneurs. Furthermore, any shortage of risk capital due to the proliferation of trusts will draw other investors into the risk capital market. See the discussions in Gareth H. Jones, *The Dead Hand and the Law of Trusts*, in DEATH, TAXES, AND FAMILY PROPERTY 119, 131 (Edward C. Halbach ed., 1977); MORRIS & LEACH, *supra* note 10, at 16; Ogus, *supra* note 81, at 217; Haskell, *supra* note 12, at 558-61. On existing legal restraints on trust investment, see *infra* note 208.

Between the poles of investment restrictions setting out absolutely inflexible managerial decisions and perfectly flexible trust delegations lies a vast gray area that we cannot explore comprehensively. But one segment of this landscape does merit a brief excursion. Suppose the testator were to restrict a gratuity not to a particular investment, but to a general level of investment risk. Need a restriction of this sort be regulated? While it is impossible to predict the preferences of any one beneficiary, both theoretical analysis and empirical evidence show convincingly that most persons are risk averse.¹¹⁷ Were the testator to limit investment risk by requiring diversification, such a stipulation would likely suit the wishes of beneficiaries as a group.¹¹⁸ While a particular risk-preferring beneficiary might be willing to pay to lift the restriction, her successors would probably offer to pay even more to

117. Of course, there are, and have always been, some persons who do prefer risk, if only for the sake of relief from boredom. Gambling is "the sweet remedy for inactivity," as Sophocles said long ago. Fragment from *The Palamedes*, in DANA F. SUTTON, *THE LOST SOPHOCLES 98-99* (1984) (ms. n.d.). For a startling early reference to risk preference, see TACITUS, *ON BRITAIN AND GERMANY* 120-21 (H. Mattingly trans., 1948) (ms. 98 A.D.) (describing Germanic tribesmen gambling themselves into slavery). See also JON ELSTER, *SOLOMONIC JUDGEMENTS* 36-122 (1989) (commenting on the utility of lotteries in decision making). The evidence for general risk aversion is conclusive, however. For modern discussions, see, for example, John H. Langbein & Richard A. Posner, *Market Funds and Trust-Investment Law*, 1976 AM. B. FOUND. RES. J. 1, 7-8; William K.S. Wang, *Some Arguments that the Stock Market Is Not Efficient*, 19 U.C. DAVIS L. REV. 341, 367 n.70 (1986). Risk aversion has traditionally been believed to follow from the decreasing marginal utility of wealth. COOTER & ULEN, *supra* note 25, at 58-65. But other phenomena may also be involved. Recent work in cognitive psychology suggests that when persons assess changes in their welfare they give greater weight to losses than to gains. Persons apparently experience a stronger psychological sense of regret when they lose what they conceive to be "theirs" than when they forego a gain of property that is not yet "theirs"—and they will pay a premium to avoid such regret. This "endowment effect" provides another possible explanation for risk aversion. See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 279 (1979); Jack L. Knetsch & J.A. Sinden, *Willingness to Pay and Compensation Demanded: Experimental Evidence of an Unexpected Disparity in Measures of Value*, 99 Q.J. ECON. 507, 516-17 (1984). On the legal implications of the endowment effect, see generally David Cohen & Jack L. Knetsch, *Judicial Choice and Disparities Between Measures of Economic Values*, 43 U. TORONTO L.J. (forthcoming 1993); Herbert Hovenkamp, *Legal Policy and the Endowment Effect*, 20 J. LEGAL STUD. 225 (1991). Risk aversion may also have a genetic component; other species of animals also exhibit risk averse behavior. *Ratonomics*, *THE ECONOMIST*, Sept. 14, 1991, at 76.

118. Diversification eliminates the "specific risk" of particular investments which are otherwise not compensated for by the securities market (precisely because the risk can thus be avoided). Following diversification, the "systematic risk" affecting the range of investments in the portfolio will remain, but the market compensates investors (here, beneficiaries) for this risk. (On this and other aspects of portfolio theory, see, for example, Langbein & Posner, *supra* note 117; Wang, *supra* note 117, at 366-75. But see Eric N. Berg, *A Study Shakes Confidence in the Volatile-Stock Theory*, N.Y. Times, Feb. 18, 1992, at C1 (describing a recent study questioning the capital asset pricing model).) Thus, beneficiaries as a group should be largely indifferent to any restrictions affecting systematic risk imposed by the testator. Higher levels of systematic risk would not enable income beneficiaries to capture a larger portion of the remuneration from a corpus. Under existing principal and income rules, trustees must distribute risk impartially between income beneficiaries and remaindermen. 3A SCOTT, *supra* note 90, § 232.

keep it in place.¹¹⁹ A restriction of this sort could efficiently persist in perpetuity. By contrast, were the testator (perversely) to mandate investment concentration, thereby heightening risk, most beneficiaries would likely agree that dead hand control was worth paying to avoid.¹²⁰ Given the impediments to bargaining,¹²¹ legal regulation of this type of restriction once again appears warranted.

A broader view of investment restrictions from the perspective of overall welfare appears to accord with efficiency analysis. Imposed in the short term by a knowledgeable testator, investment restrictions limiting the power of sale can exploit the testator's own managerial expertise, in her beneficiaries' best interests. But over the long run, unforeseen changes in the investment climate will erode whatever paternalistic benefits such restrictions hold initially. Regulation could again be premised on the avoidance of arbitrary restraints that deplete beneficiaries' welfare.

A similar argument conceivably could be made even with regard to the simple bequest-in-trust. The testator's decision to pass managerial control over to a third party can protect beneficiaries known to be dull or inexperienced from their own infirmities but may appear arbitrary with respect to beneficiaries who remain unborn and hence anonymous. Given, however, the continued flexibility of investment within a simple trust and the costs it can avoid, this argument ultimately fails to persuade. Estate planners have long touted trusts as the ideal vessel for a future interest, irrespective of their beneficiaries' potential abilities.¹²² In Great Britain, lawmakers have

119. An individual beneficiary preferring a different level of specific risk from the specified one might be able to compensate for the restriction by adjusting the investment pattern of his own portfolio or, again, by simply selling the trust interest for cash. The same can be said of an investment restriction governing systematic risk, where the beneficiary's individual aversion to or preference for risk fails to match the risk premium or discount created by the market for the trust portfolio. See *supra* notes 107, 118.

120. If, however, the endowment effect contributes significantly to risk aversion, and if beneficiaries view an inheritance—at least initially—as not being “their” property, then beneficiaries as a group might be somewhat less willing (if only at first) to pay to avoid a high-risk investment restriction than they would be otherwise. Beneficiaries might, in other words, be more inclined to gamble with what they conceive to be the testator's property than they would be with their “own” (though only so long as they continue, psychologically, so to view the property). On the endowment effect, see *supra* note 117. At any rate, beneficiaries preferring less risk might again be able to take private action to reduce it. See *supra* note 119.

121. See *supra* notes 82-86 and accompanying text.

122. E.g., Lewis M. Simes, *Future Interests in Chattels Personal*, 39 YALE L.J. 771, 779 (1930) (“[I]t may almost be said to be a slip in draughtsmanship to create future interests . . . without the intervention of a trust.”); Orin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1340 (1969). While the Prudent Person Rule operates to regulate the investment of a trust corpus in ways that do not constrain beneficiaries who receive their bequests out of trust, the Rule is waivable; and estate planners have typically advised that it be waived. Langbein & Posner, *supra* note 117, at 2, 5.

gone so far as to bar future interests out of trust,¹²³ and some American commentators have proposed to follow suit.¹²⁴ A minimal investment restriction of this type could be extended indefinitely without doing harm to beneficiaries as a group.

C. *Distribution Restrictions*

Still another way in which the dead hand might seek to meddle in the affairs of the living is by distributing property among beneficiaries, either living or unborn. This type of control is exercised under the vast majority of estate plans.¹²⁵ Whenever a testator allocates property among beneficiaries, whether in or out of trust, a distribution occurs. Distributions may be made intragenerationally among contemporaneous beneficiaries and intergenerationally among serial beneficiaries.¹²⁶ Distributions may also be inflexible (as when the testator specifies precise allocations among beneficiaries) or flexible (as when the testator fixes a pool of beneficiaries and delegates to a third party discretion to allocate among them). When distributing to members of a future generation, whether flexibly or inflexibly, the testator cannot name her beneficiaries, so instead she must define them.¹²⁷

Once again, testators have a greater incentive to produce when in possession of more extensive powers of serial distribution. Such powers create an opportunity for the testator to satisfy her dynastic ambitions. By sealing up a corpus of property for generations, safe from consumption or dissipation, the testator could provide an income to a whole line of future descendants. She might thereby ensure the continued status of her family and achieve for herself a sort of "vicarious immortality."¹²⁸ This opportunity can enhance the value of property in the testator's hands.

123. Settled Land Act, 1925, 15 Geo. 5, ch. 18 (Eng.); Law of Property Act, 1925, 15 Geo. 5, ch. 20 (Eng.).

124. E.g., C. Dent Bostick, *Loosening the Grip of the Dead Hand: Shall We Abolish Legal Future Interests in Land?*, 32 VAND. L. REV. 1061 (1979); William F. Fratcher, *A Modest Proposal for Trimming the Claws of Legal Future Interests*, 1972 DUKE L.J. 517, 549-50.

125. The one exception is the charitable bequest, which restricts use, but for which the ultimate "beneficiary" is society at large.

126. Once again, distribution-restricted private transfers have a public transfer analogue. Intragenerational public distributions take the form of government subsidies. Intergenerational public distributions take the form of tax surpluses (redistributing to later generations) and, more commonly, deficit spending (redistributing from later generations to the current one).

127. "To A for life and then to A's first grandchild" would be a simple example of an inflexible intergenerational allocation.

128. Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 548 (1964). On the psychological springs of dynasticism, see also Boulding, *supra* note 31, at 97; Beckstrom, *supra* note 26, at 222-25; *supra* note 52. Dynasticism probably has a significant cultural component; Professor Leach believed that the impulse had declined in this century. Leach, *supra* note 14, at 726-27. On the history of efforts to assert long-term distributive control, see 4 RESTATEMENT OF PROPERTY pt. 1 (1936). More immediately, intergenerational distribution restrictions can yield tax efficiencies, and they can also serve to avoid subsequent transfers to in-laws whom the testator prefers not to benefit. MCGOVERN ET AL., *supra* note 35, § 8.1, at 301-02.

The consequences of a distribution restriction for the wealth and welfare of beneficiaries are more difficult to assess. As with dead hand control over investment, the level of flexibility built into a distribution restriction may be crucial to the analysis.

1. Inflexible Allocations

When a testator divides sums of money between two contemporaneous beneficiaries, we can conclude that together they enjoy the same total wealth as they would if the interests were combined in either one of them. In such a case, allocation is a zero-sum game: whatever one beneficiary would pay to undo the division, consolidating the interests in himself, the other would pay to retain it.¹²⁹ This principle also applies when a testator divides sums of money between two beneficiaries in different generations.¹³⁰ The amount the current beneficiary would be willing to pay to accelerate and capture the future interest is its present value—the same amount the later beneficiary would offer to hold on to it.¹³¹ If a testator creates future interests in

129. This is not to say that beneficiaries will each derive the same *utility* from the property; they may not. But a utilitarian analysis of optimal property division is hampered by the difficulty of measuring utility and by obstacles to interpersonal comparisons of utility. See generally ABBA P. LERNER, *THE ECONOMICS OF CONTROL* 24-40 (1944); I.M.D. LITTLE, *A CRITIQUE OF WELFARE ECONOMICS* 53-68 (1950) (responding to Lerner); POSNER, *supra* note 27, at 54-56, 79; POSNER, *supra* note 12, § 16.2-.3, at 458-63; AMARTYA K. SEN, *ON ECONOMIC INEQUALITY* 1-23, 77-106 (1973); Robert D. Cooter, *The Best Right Laws: Value Foundations of the Economic Analysis of Law*, 64 *NOTRE DAME L. REV.* 817, 823-27 (1989). The analysis in the text assumes that alternative beneficiaries do not *themselves* have interdependent utilities. If their utility functions *are* interdependent, then *both* could be made better off by a different division of the property between them (a possibility that can serve to justify public redistribution of wealth by government). In that event, however, alternative beneficiaries within a family can always make further gratuitous transfers to each other in order to achieve Pareto optimality (a possibility that may not exist, because of free rider problems, when interdependent utilities tie larger public groups). Harold M. Hochman & James D. Rodgers, *Pareto Optimal Redistribution*, 59 *AM. ECON. REV.* 542, 542-43 & n.4 (1969).

130. Temporal divisions of property may, however, entail an information cost, in that the holder of a future interest will not (absent information) know how to value his interest. See Gail B. Bird, *Trust Termination: Unborn, Living, and Dead Right Hands—Too Many Fingers in the Trust Pie*, 36 *HAST. L.J.* 563, 582 n.102 (1985) (positing that inexperienced owners may sell future interests at “a very great sacrifice”).

131. Professor Stake argues that temporal limits on allocation enhance utility by ensuring that more property rights are already in the hands of living persons who possess the capacity to enjoy them. Redistribution of rights from the unborn to the living, according to Stake, “represents a direct gain in happiness,” by adding “some current utils to the future utils.” Jeffrey E. Stake, *Darwin, Donations, and the Illusion of Dead Hand Control*, 64 *TUL. L. REV.* 705, 739-42 & n.104 (1990). Apart from the problem of making interpersonal utility comparisons, see *supra* note 129, which is elided here, Stake seems not to recognize that redistribution from the unborn to the living will *reduce*, rather than leave constant, future utility. If *A* begins with a life estate and is now awarded unborn-*B*'s remainder, *A* will “gain in happiness” from this redistribution only by consuming the whole fee simple, which will leave *B* worse off; whereas, if *A* conserves the remainder for *B*, *A* gains nothing from the transaction.

property other than money, complications in the process of sale will hinder marketability of the corpus and thereby generate social costs; but these can be avoided by creating a serial power of sale or by placing the property in trust, as previously discussed.¹³²

When a testator slices property into shapes other than definite amounts, additional problems arise. If a testator chooses to condition receipt of a future interest (or loss of a present one) on the occurrence or nonoccurrence of some contingency, then the beneficiary is exposed to risk.¹³³ Most persons are risk averse.¹³⁴ As a result, beneficiaries will in general appraise interests of this sort at less than their expected value. This does not mean that the market will necessarily *discount* contingent interests for risk: the specific risk of the contingency can be negated by merging alternative contingent interests back into a fee simple, a fact that the market should take into account.¹³⁵ But because such mergers would involve a further (and probably substantial) *transaction* cost, bids for contingent interests will drop, leaving beneficiaries worse off.¹³⁶ In other words, when a testator injects an element

132. See *supra* notes 72-73, 112-16 and accompanying text. Intertemporal allocation also impedes the mortgaging of, and inhibits the improvement of, real property. For recent discussions, see Alexander, *supra* note 65, at 1259-61; Stake, *supra* note 131, at 716-23. See also *supra* note 69.

133. "Income to A if A reaches the age of 30, otherwise to B," is a typical sort of contingent distribution restriction. Note the qualitative distinction between such a contingent interest and a *conduct* restriction (for example, "Income to A if A marries, otherwise to B"). Where a beneficiary can by his behavior *control* whether he receives a bequest, rather than remaining at the mercy of chance events, then he experiences no risk (although he does suffer a cost, to the extent that he prefers not to fulfill the condition stipulated). See *supra* notes 67, 70.

134. See *supra* note 117.

135. When efficiently avoidable, specific risks are not compensated by the market. Portfolio theory can here be applied to the problem of contingent interests. See *supra* note 118. For an early recognition of the potential for risk negation in connection with contingent interests, see *Watson v. Dodd*, 68 N.C. 528, 531 (1873), quoted *infra* note 136.

136. Transaction costs for the sale of contingent interests may be adversely affected (1) by the lack of an established market in these nonhomogeneous assets and (2) by the bilateral monopoly of the parties who seek to merge their interests. As an early judge noted astutely (if not entirely accurately), "no one would bid except the holder of the first estate [that is, the alternative contingent interest], for the purpose of extinguishing the limitation." *Watson v. Dodd*, 68 N.C. 528, 531 (1873). While a third party might in fact buy a contingent interest in the hope of also acquiring the alternative contingent interest, a bilateral monopoly will still arise when later in the chain of transactions a merger of the interests is sought. This cost again will be reflected in the third party's initial bid for the contingent interest. (On the transaction cost problem of bilateral monopoly, see POSNER, *supra* note 12, § 3.8, at 61-63.) When an alternative contingent interest is held by an unborn beneficiary, merger of the interests will require a court order, further inflating transaction costs. See Bird, *supra* note 130, at 600-05. See also *supra* note 130 (on information costs). All told, these costs will likely be high and could even exceed the risk-avoidance benefits of a merger. In that event, potential buyers of a contingent interest, not being able efficiently to negate the risk, would instead discount for the risk. For judicial assessments of the depression of bids for contingent interests, see *Suskin & Berry, Inc. v. Rumley*, 37 F.2d 304, 306 (4th Cir. 1930); *Smith v. Gilbert*, 41 A. 284, 285-86 (Conn. 1898); *Watson v. Dodd*, 68 N.C. 528, 531 (1873); *Adams v. Dugan*, 163 P.2d 227, 231 (Okla. 1945); *Mears v. Lamona*, 49 P. 251, 254 (Wash. 1897); *Howbert v. Cawthorn*, 42 S.E. 683, 686 (Va. 1902).

of chance into the allocation of her property, we are no longer faced with a zero-sum game. Even if the *corpus* is held in trust, and hence is readily marketable, all contingent beneficiaries, assessing their *beneficial* interests from the perspective of risk aversion and transaction costs, will share a less valuable pie.¹³⁷ And again, they cannot readily bargain with the testator to slice it up differently.¹³⁸

On the other hand, when a testator bequeaths a life estate in property or strings together a series of life estates, she may leave behind a *more* valuable pie; beneficiaries could appraise these interests *above* their actuarial value. A life estate is nothing other than an annuity. And annuities, though of uncertain value, are a *hedge* against risk.¹³⁹ They are, in fact, the mirror image of life insurance. One guards against the danger of dying too soon, and the other cushions the chance of living too long.¹⁴⁰ Nevertheless, links in a chain of life estates differ from annuities sold commercially, in that life tenants do not know for certain when their interests will become possessory; a long-living predecessor may substantially, or even completely, preempt the next in line.¹⁴¹ This possibility adds a useless element of risk to which beneficiaries may be averse, leaving the overall effect on their wealth unclear.¹⁴²

If one turns from matters of value to broader concerns for well being, one can justify more readily the regulation of allocations within a future generation. Even if a reallocation from one beneficiary to another had no impact on their total wealth, it could still affect their total welfare, if one

137. The Restaters gleaned the fundamental point: "The division of ownership into successive interests tends to lessen the amount realizable upon a sale of the separate interests, and thus diminishes the total purchasing power of the wealth represented by the thing in which such divided interests have been created." 1 RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS 9 (1983); see also Stake, *supra* note 131, at 732-39.

138. See *supra* notes 82-86 and accompanying text.

139. Life estates in unborn persons are technically contingent ("unvested") interests; the contingency here is that they come into being. This is a "risk" that beneficiaries never appreciate, however. Fixed income annuities also involve an inflation risk, although testators probably do not often create fixed income life estates. On the testator's power to allocate income and principal as she chooses, see 3A SCOTT, *supra* note 90, § 233.5, at 50-51. On the problem of inflation risk, see WILLIAM F. SHARPE & GORDON J. ALEXANDER, INVESTMENTS 305-12 (4th ed. 1990).

140. Langbein, *supra* note 76, at 745. Another reason annuities may appeal to beneficiaries is that they are protected on the downside, so to say, by unawareness: if an annuitant dies before receiving the full actuarial value of his annuity, he will be oblivious to that eventuality.

141. See Eugene W. Youngs, *Future Interests—Problem of the Life Tenant Who Lives "Forever"*, 5 N. KY. L. REV. 3 (1978) (addressing the potential disutilities of life estates).

142. Again, the net aggregate cost, if any, of a chain of life estates is limited by the transaction cost of consolidating them back into a fee simple. Though life estates, once sold, lose their potential utility to owners and also entail useless risk (a life estate *pur autre vie* is not a hedge!), the market should not discount them for risk if the specific (here, actuarial) risk can be efficiently negated. But the market will still take transaction costs into account. See *supra* notes 135-36 and accompanying text.

had greater need than the other.¹⁴³ But allocations on the basis of need are possible only in the near term. Testators simply cannot divine today the exigencies of unborn beneficiaries living in a tomorrow concealed by the fog of time. The testator who would presume to allocate among the unborn does so blindly, with distributive consequences that are inevitably arbitrary.¹⁴⁴

Still, arbitrary distribution of family resources is in one respect unavoidable. When a testator creates a future interest, part of what she is doing is dividing property *among* generations. This exercise of power differs analytically from allocations *within* a future generation. Of course, human persons lack the foresight to anticipate intergenerational needs with any greater clarity than they can prophesy future intragenerational needs. No testator can meaningfully assess *ab initio* the relative merits of distribution to her children versus her children's unborn descendants. But, then again, are the children really better placed to make such an assessment? On the spot judgments foster informed intragenerational allocations among a group. In the case of *intergenerational* allocations, there *is* no one spot! While the children will be able to contemplate their own needs more accurately than could their parent, they will hold only a marginal advantage over her in predicting the comparative *collective* needs of succeeding generations. Considered prospectively, even a single generation forward, those needs may only be dimly perceived. In matters of allocation among generations, decisions by a living hand will be hardly less arbitrary than decisions by a dead one, for truly sound judgments about intergenerational divisions of wealth can only be made in the brightness of hindsight. Consequently, the intergenerational divisions mandated by a future interest in property will not clearly be inferior, in a welfare sense, to those that would result if each generation in turn received an unfettered fee simple.¹⁴⁵

The issue of distribution among generations is further complicated by another consideration. When a testator chooses to ration the enjoyment of property serially, she is in the process making a decision to conserve the property. Conservation of wealth is generally believed to avail society by

143. See *supra* notes 41, 129.

144. The idea, as usual, is centuries old. In establishing limits on testamentary freedom, Adam Smith concluded that:

The best rule seems to be that we should permit the dying person to dispose of his goods as far as he sees, that is, to settle how it shall be divided amongst those who are alive at the same time with him. For these it may be conjectured he may have contracted some affection; we may allow him reasonably then to settle the succession amongst them.

SMITH, *supra* note 1, at 70.

145. Cf. SIMES, *supra* note 2, at 61-62, 97-99 (arguing that each generation should decide for itself how much to consume and save); HOBHOUSE, *supra* note 2, at 182-85 (same).

contributing to long-term economic growth.¹⁴⁶ Indeed, granting a testator the right to lengthen a chain of future interests encourages saving in *two* ways. Such a right contributes to the testator's own incentive to save, even as it obligates her beneficiaries to follow suit. To the extent that intergenerational allocations inspire a higher rate of saving, they provide at least one public benefit, however much they aggravate distributive arbitrariness.¹⁴⁷

In short, justifications for regulating inflexible distribution restrictions, though not incontrovertible, are nonetheless sustainable. While the wealth consequences of these restrictions may vary, the arbitrariness implicit in them is clear. What remains obscure is the *marginal* impact of dead hand control of this sort and the weight society should give to the countervailing social benefits of encouraging testators to save more of their wealth and of authorizing them to establish in their wake regimens of wealth conservation for those who follow.

2. Flexible Allocations

Distribution restrictions need not be imposed inflexibly, however. Instead of pinpointing which persons are to receive which lot of property, a testator could simply designate the beneficiaries of a gratuity and then delegate to

146. The goal of intergenerational capital accumulation is inherently normative, for it is impossible to value objectively such a reallocation. For an excellent survey of the welfare economics of saving, see Amartya K. Sen, *On Optimising the Rate of Saving*, 71 *ECON. J.* 479 (1961). For a smattering of views, see BOULDING, *supra* note 31, at 28, 98-99; COLLARD, *supra* note 77, at 161-65; POSNER, *supra* note 12, § 17.6, at 489; RAWLS, *supra* note 41, at 284-98; B.M. Barry, *Justice Between Generations*, in *LAW, MORALITY, AND SOCIETY* 268 (P.M.S. Hacker & J. Raz eds., 1977); Brian Barry, *Circumstances of Justice and Future Generations*, in *OBLIGATIONS TO FUTURE GENERATIONS* 204 (R.I. Sikora & Brian Barry eds., 1978); Ogus, *supra* note 81, at 218-19; Stephen F. Williams, *Running Out: The Problem of Exhaustible Resources*, 7 *J. LEGAL STUD.* 165, 181-82 (1978). Emphasizing promotion of saving as an aspect of the productivity rationale for freedom of testation, see SIDGWICK, *supra* note 8, at 104-05; Edward C. Halbach, Jr., *Succession—Its Past, Future and Justification: An Introduction*, in *DEATH, TAXES AND FAMILY PROPERTY*, *supra* note 36, at 5-6.

147. At the same time, accumulation *taken to extremes* could result in super-optimal levels of saving and underconsumption, as well as socially unhealthy concentrations of wealth. See MCGOVERN ET AL., *supra* note 35, § 13.9, at 562-63; MORRIS & LEACH, *supra* note 10, at 266-306; SIMES, *supra* note 2, at 83-109; Ogus, *supra* note 81, at 218-19. Avoiding undue wealth concentration stands alongside capital accumulation as a longstanding American social goal, beginning with republicanism. For historical background, see EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM* 369-70, 377, 382-84 (1975); John V. Orth, *After the Revolution: "Reform" of the Law of Inheritance*, 10 *LAW & HIST. REV.* 33 (1992) (on American opposition to primogeniture and entails). For a modern discussion, see R.H. TAWNEY, *EQUALITY* (rev. ed. 1952); but compare the early argument, disavowed by Adam Smith, that the concentration of wealth accomplished by entails was socially useful, because it provided a bulwark against the exercise of arbitrary power by the central government. *WEALTH OF NATIONS*, *supra* note 63, at 166.

someone else the responsibility of parceling it out among them.¹⁴⁸ Testators build distributive flexibility into bequests by creating special powers of appointment. The donee of the power is authorized to make distributions, but only to a restricted class of beneficiaries.¹⁴⁹ Testators can also incorporate special powers into a trust (known as a discretionary trust), by empowering the trustee to spray principal and/or income among the class of beneficiaries. Thus imposed, flexible distribution restrictions are mainstays of modern estate planning. Apart from certain tax advantages,¹⁵⁰ they appeal to testators who wish to confine property to a closed circle, while leaving room to adapt distributions within that circle to changing circumstances.¹⁵¹

a. Equity and Efficiency

The value of a bequest subject to a special power, contemplated *ex ante* by its beneficiaries, depends upon the manner in which they expect the donee of the power to exercise her discretion. If a power will be exercised randomly or arbitrarily, the beneficiaries hold interests that resemble tickets in a sweepstakes. Risk averse beneficiaries should prefer a fixed allocation over a random one. In practice, however, special powers rarely operate in this manner. Testators establish these powers precisely to ensure that future distributions will *not* be arbitrary; their flexibility is designed to permit distributions responsive to the changing relative needs of the beneficiaries. Assuming that most donees of special powers exercise discretion on this basis,¹⁵² the beneficiaries will hold interests more akin to an insurance policy

148. A testator could combine a flexible intragenerational distribution restriction with an inflexible intergenerational distribution restriction by requiring her delegate to distribute (in discretionary shares) a set amount of income and/or principal to beneficiaries at any given time, and preserve the rest for later comers. Alternatively, a testator could avoid making an intergenerational distribution by also giving her delegate discretion to invade principal or accumulate income at any given time.

149. The class of beneficiaries (known technically as the objects of the power) can be as large or small as the testator chooses. 3 RESTATEMENT OF PROPERTY § 323 cmt. h (1936).

150. See generally DUKEMINIER & JOHANSON, *supra* note 43, at 443, 713-15; Amy M. Hess, *The Federal Taxation of Nongeneral Powers of Appointment*, 52 TENN. L. REV. 395 (1985).

151. See generally Harrison Gardner, *Designing Wills and Trust Instruments to Provide Maximum Flexibility*, 18 EST. PLAN. 138 (1991); Frederick A. Systma, *How to Increase Flexibility of Testamentary Trusts to Carry Out Decedent's Objectives*, 2 EST. PLAN. 194 (1975).

152. A testator may spell out criteria for the exercise of discretion, as when she establishes a "support trust." Otherwise, trustees might be inclined to make equal distributions to all beneficiaries, simply as the path of least resistance. But trustees and other donees of special powers are deterred from making arbitrary distributions by the threat of judicial action against them for fraud or lack of good faith. See generally 1 RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 12.2 & cmt. c, § 20.2 & cmts. (1983); SCOTT, *supra* note 90, §§ 128.3-128.4, 187-187.5; Amos H. Eblen, *Fraud on Special Powers of Appointment*, 25 KY. L.J. 3 (1936). Suggesting other practical tips to avoid arbitrary behavior by trustees, see Frazer, *supra* note 111, at 18.

than a lottery ticket. And insurance protection should *appeal* to the risk averse, at least as much as a fixed allocation.¹⁵³ Indeed, comprehensive insurance against need would be difficult to obtain otherwise; commercial outlets rarely provide it due to problems of adverse selection.¹⁵⁴ Of course, considering their situation *ex post facto*, relatively affluent beneficiaries might seek to opt out of such an insurance pool if they had the chance to bargain with the testator. But initially, when the future interest is created, these beneficiaries could be expected to elect coverage; risk aversion compels this choice when made behind a veil of ignorance.¹⁵⁵

Considered from the vantage point of distributive welfare, flexible distribution restrictions also avoid a central drawback of inflexible ones. By delegating rather than dictating distributive decisions, the testator provides for distributive control by a living (not a dead) hand. The testator's action here is structurally analogous to the delegation of authority over investment when a testator decrees that property be held in trust. Assuming that her delegate remains alert to the beneficiaries' evolving relative needs, their overall welfare will be secured.¹⁵⁶

Still, when a testator establishes a special power, whether in or out of trust, she does define the class of eligible beneficiaries. Though the donee of the power will have authority to make such distributions as she, in her informed, immediate judgment deems appropriate, those distributions will remain restricted to the category of beneficiaries set out in the original, yellowing instrument of gift. The question thus arises whether *social* welfare will be improved or impaired by permitting without regulation the temporal extension of powers for the benefit of classes of beneficiaries whose boundaries (if not precise allotments) are rigidly prescribed.

Here, the public policy that confronts us involves the width, rather than the wit, of the estate plan. At issue is the breadth of distribution of inherited wealth in society. That the public holds a stake in this matter is not in dispute. Most thinkers today accept, almost as an article of faith, that wider diffusion of wealth is socially desirable.¹⁵⁷ One would nowadays have to

153. The popularity of insurance is one of the empirical verifications of risk aversion. See *supra* note 117.

154. See the related discussion in GOODIN, *supra* note 40, at 157-59.

155. See generally RAWLS, *supra* note 41, at 137-42. Similar arguments have been made to support mandatory public insurance schemes. See, e.g., RICHARD E. WAGNER, TO PROMOTE THE GENERAL WELFARE 33, 36-37 (1989). A dissatisfied beneficiary could *not* limit the cost of a flexible allocation by selling her interest prospectively. Discretionary interests are impossible to value and hence are unsalable. Cf. *supra* notes 71, 107, 135-36 and accompanying text.

156. See *supra* note 41.

157. A menagerie of thinkers has mined lodes of distributive egalitarianism out of utilitarian, political, and moral theory. On the (controversial) assumption that all persons' utility functions are alike and diminish with each additional increment of wealth, Jeremy Bentham concluded early that total happiness would be maximized if wealth were equally divided. I JEREMY BENTHAM, *The Philosophy of Economic Science*, in JEREMY BENTHAM'S ECONOMIC WRITINGS

search far and wide (perhaps starting in the inner sanctums of the University of Chicago?) for the political economist who dismissed wealth stratification as insignificant, let alone championed it as a positive good.¹⁵⁸ Current debates over wealth distribution revolve instead around the optimal "trade-off" between enforced equality (via taxation) and the greater productive efficiency that derives from unregulated accumulation. This question remains both theoretically controversial and politically charged.¹⁵⁹ On the other hand, few would deny that *deliberate* dispersions of accumulated wealth (via wills), unburdened by the disincentive effects that accompany involuntary redistribution, serve the public interest and therefore ought to be legally facilitated.

At first sight, limitations on the range of beneficiaries would appear to hinder the voluntary dispersion of wealth by qualifying the freedom of subsequent generations to bequeath property more widely. On reflection, however, the point is not so clear. Even absent a formal restriction, certain extra-legal forces, empirically verifiable, would operate to cabin in the objects of most persons' generosity. American society has always been, and continues to be, characterized by nuclear families.¹⁶⁰ Typically, testators make the bulk of their distributions to spouses and children, rather than to collateral relatives, acquaintances, or charities.¹⁶¹ Given this social backdrop,

81, 113-17 (W. Stark ed., 1952) (ms. n.d.); see also LERNER, *supra* note 129, at 24-40; William Breit & William P.J. Culbertson, Jr., *Distributional Equality and Aggregate Utility: Comment*, 60 AM. ECON. REV. 435 (1970). For well-charted roadmaps through other theoretical quarries, see WALTER J. BLUM & HARRY KALVEN, JR., *THE UNEASY CASE FOR PROGRESSIVE TAXATION* 68-90 (1953); WAGNER, *supra* note 155, at 21-44 (1989). See also *supra* note 147.

158. Historically, however, the search would be brief. Once it was a commonplace that a wealthy class was necessary to perpetuate the culture of a society. *E.g.*, HENRY SIDGWICK, *THE PRINCIPLES OF POLITICAL ECONOMY* 517-24 (1883); see also JOHN K. GALBRAITH, *THE AFFLUENT SOCIETY* 67-81 (3d ed., rev. 1976); HAYEK, *supra* note 36, at 125-30; MUNZER, *supra* note 22, at 400; WEDGWOOD, *supra* note 28, at 209-12. In the context of inherited wealth, primogeniture was glorified in England as both natural and expedient. 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 273-74 (S.F.C. Milsom ed., 1968); see also *supra* note 147.

159. See, *e.g.*, ANTHONY B. ATKINSON & JOSEPH E. STIGLITZ, *LECTURES ON PUBLIC ECONOMICS* 394-423 (1980); GOODIN, *supra* note 40, at 229-35; ARTHUR M. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* (1975); POSNER, *supra* note 12, § 16.2, at 458-61, 460 n.2. For a discussion in connection with inheritance, see Richard A. Epstein, *Justice Across the Generations*, 67 TEX. L. REV. 1465 (1989). *But see* Hovenkamp, *supra* note 27, at 847-51 (questioning this paradigm).

160. The nature of the American family has undergone some change in recent years, particularly in the increasing frequency of single parent households and unmarried couples, although its essential, nuclear character remains intact. For recent discussions of trends in American family structure, see, for example, *THE CHANGING AMERICAN FAMILY AND PUBLIC POLICY* (Andrew Cherlin ed., 1988) [hereinafter *CHANGING AMERICAN FAMILY*]; JAN E. DIZARD & HOWARD GADLIN, *THE MINIMAL FAMILY* (1990); Felicity Barringer, *Changes in Family Patterns: Solitude and Single Parents*, N.Y. TIMES, June 7, 1991, at A1; *The 21st Century Family*, NEWSWEEK (special ed. Winter/Spring 1990). Some of the implications from the standpoint of probate law are considered in *Recent Developments*, 9 PROB. L.J. 327 (1989).

161. A wide range of studies of probate records, both historical and contemporary, draw this conclusion. CAROLE SHAMMAS ET AL., *INHERITANCE IN AMERICA FROM COLONIAL TIMES TO*

a flexible distribution restriction would have a clear stratifying effect only when it confined wealth to a *segment* of the nuclear family. A discretionary trust for the benefit of the first-born descendants of the testator, for example, would almost certainly enrich a smaller class of beneficiaries than would an unencumbered corpus of property. Legal regulation of such a trust can be justified by the public interest in ensuring broad distribution of assets (although, once again, that interest must be weighed against the concurrent policy in favor of spurring testators to productivity).¹⁶²

By contrast, if a testator imposed upon a bequest a flexible distribution restriction whose metes and bounds *encompassed* the nuclear family, her action probably would narrow only marginally the dispersion of inherited wealth. Here, the outer range of beneficiaries would be formally restricted, precluding such subsequent testamentary transfers to nonrelatives or charities as might otherwise occur. But given the tendency to limit bequests to the nuclear family, the fraction of the family's wealth siphoned off by such means would probably have remained minute in any event.

In fact, a flexible distribution restriction encompassing the nuclear family can function affirmatively to destratify wealth, at least among the testator's progeny. To illustrate, consider a discretionary trust for the benefit of a testator's spouse and all of her descendants. If the trust terminated early, its corpus would be distributed outright to remaindermen, presumably the descendants then in being. Each one of those descendants, in turn, would likely apportion most of his property at death among *his* descendants, without regard to the needs of other descendants of the testator who are

THE PRESENT 179-206 (1987) (summarized at 207); EDUARD C. LINDEMAN, *WEALTH & CULTURE* 50 (1936); SUSSMAN ET AL., *supra* note 30, at 83-120; Browder, *supra* note 122; Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1963); Mary L. Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 321; Mary L. Fellows et al., *An Empirical Study of the Illinois Statutory Estate Plan*, 1976 U. ILL. L.F. 717; John R. Price, *The Transmission of Wealth at Death in a Community Property Jurisdiction*, 50 WASH. L. REV. 277 (1975); Edward H. Ward & J.H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393; Note, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041 (1978); Joel R. Glucksman, Note, *Intestate Succession in New Jersey: Does It Conform to Popular Expectations?*, 12 COLUM. J.L. & SOC. PROB. 253 (1976). Many of the relevant studies are tabulated in MCGOVERN ET AL., *supra* note 35, § 1.3, at 19-20. A federally funded investigation of these and other aspects of intergenerational wealth transmission is currently underway. Janet McCubbin & Jeff Rosenfeld, *Introducing the Intergenerational Wealth Study*, 4 PROB. & PROP., Mar.-Apr. 1990, at 25. Drawing the same conclusion for *inter vivos* gratuitous transfers, see JOSEPH G. ALONJI ET AL., *IS THE EXTENDED FAMILY ALTRUISTICALLY LINKED? DIRECT TESTS USING MICRO DATA* (National Bureau of Economic Research Working Paper No. 3046, 1989).

162. See *supra* note 159. This analysis would also apply to inflexible schemes of serial distribution, where the named or defined beneficiaries make up only a portion (for example, a chain of life estates restricted to first-born children) of the family. And, in fact, entails were abolished in post-revolutionary America, *inter alia*, because they tended to stratify wealth. Orth, *supra* note 147, at 37, 41-42.

collateral to *him*. At each generation, a nuclear family fissions into a host of new nuclear families. Yet distributive equity might be better served by a reallocation from one subclass to another.

Now consider by contrast an equivalent discretionary trust whose term is extended. Instead of being partitioned among the subclasses that crystallize as the family branches off, trust assets here will continue to be sprinkled among the whole fluid class of descendants. The trustee will stand in a position to transcend the extra-legal barriers that would otherwise forestall redistribution among collateral relatives of unequal means. Granting testators the liberty to prolong such a trust would thus promote the destratification of family wealth *and* (for testators so inclined) encourage productivity.¹⁶³

b. Trust, State, and Family

One might question on other grounds, however, whether society ought to permit the intergenerational extension of flexible distribution restrictions, no matter how broad, despite their potential efficiencies and distributive equities. One of the interesting features of a discretionary trust is its similarity to certain other entities that also serve to protect collective well-being. Like the "little commonwealth" of the family,¹⁶⁴ a discretionary trust can operate as a miniature welfare state, redistributing wealth from the relatively affluent to the relatively needy.¹⁶⁵ Yet, as a mechanism for economic support, the collective welfare state has ever been the target of various criticisms.¹⁶⁶ Those criticisms also bear by analogy on the desirability of flexible distribution restrictions, suggesting an alternative array of arguments for their legal regulation.

One objection sometimes made to the welfare state is that it undermines the self-reliance of its citizens. Self-reliance, or "rugged individualism," has long been exalted as an end in itself, reinforcing the moral fiber of the

163. Of course, flexible distribution restrictions limited to the nuclear family will not help to destratify wealth between the family *and* society, but neither would the absence of such a restriction, given the tendency of testators to limit bequests to family members. *Society-wide* destratification can only be accomplished via a system of involuntary estate taxation.

164. The phrase is John Stuart Mill's. 1 MILL, *supra* note 25, at 216. That families do bequeath internally on the basis of relative need is supported by empirical evidence. Gary S. Becker & Nigel Tomes, *Child Endowments and the Quantity and Quality of Children*, 84 J. POL. ECON. S143 (1976); Zvi Griliches, *Sibling Models and Data in Economics: Beginnings of a Survey*, 87 J. POL. ECON. S37 (1978); Nigel Tomes, *The Family, Inheritance, and the Intergenerational Transmission of Inequality*, 89 J. POL. ECON. 928 (1981).

165. We have earlier suggested public transfer analogues to other forms of dead hand control. See *supra* notes 67, 102, 126. For a comparison of charitable trusts to the welfare state, see SIMES, *supra* note 2, at 110-11. See also *infra* note 172.

166. For recent critiques of the political economy of the welfare state, see GOODEN, *supra* note 40; WAGNER, *supra* note 155.

nation.¹⁶⁷ In precisely this vein, the first *Restatement of Property* condemned all perpetual trusts as tending to “hamper the normal operation of the competitive struggle” and hence as obstructing individualism.¹⁶⁸ The same criticism would apply a fortiori to discretionary trusts that provide added support for needier beneficiaries and hence impede competition both between beneficiaries and third parties *and* among beneficiaries inter se.

To the extent that the exaltation of self-reliance is axiomatic, one can respond only by pointing out that it is today an axiom most thinkers reject. The modern orthodoxy identifies support of the relatively needy as a virtue, rather than a vice, of political systems. In the competitive struggle of ideas at least, it is the weak who have triumphed over the strong.¹⁶⁹ What is more, those commentators who today continue to condemn dependence on the *state* generally extol the traditional bonds of dependency within the *family* as morally commendable.¹⁷⁰ If, for purposes of modern moralizing, “the boundaries of the ‘self’ . . . are expanded to include the family but to exclude the state,”¹⁷¹ then trusts for the benefit of one’s family no longer

167. The theme traces back to the social Darwinists, and still further back to the transcendentalists, in the United States. See generally 2 RALPH WALDO EMERSON, *Self-Reliance*, in THE COLLECTED WORKS OF RALPH WALDO EMERSON 25 (Joseph Slater ed., 1979); RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* (1955). And in the context of gratuities, see 3 EMERSON, *Gifts*, in THE COLLECTED WORKS OF RALPH WALDO EMERSON, *supra*, at 93. On the theme of self-reliance as a modern criticism of the welfare state, see GOODIN, *supra* note 40, at 332-59.

168. 4 RESTATEMENT OF PROPERTY 2132 (1936). Curiously, Professor Gray, who had excoriated the spendthrift trust as infused with “that spirit . . . of socialism,” GRAY, *supra* note 88, at ix, made no similar argument against perpetual trusts in his treatise on the Rule against Perpetuities. Cf. GRAY, *supra* note 2, § 268.

169. As Nietzsche predicted. FRIEDRICH NIETZSCHE, *On the Genealogy of Morals*, in ON THE GENEALOGY OF MORALS AND ECCE HOMO 46-48 (Walter Kaufmann ed., Vintage Books 1969) (1887). By the 1960s, a scholar could state categorically that “[the] concept of a ‘free economy’ and the ‘survival of the fittest’ is as dead as the dodo.” Donald Richberg, *Liberalism, Paternalism, Security, and the Welfare State*, in THE WELFARE STATE: SELECTED ESSAYS 184, 188 (Charles I. Schottland ed., 1967). Since then, however, neo-conservative scholars have mounted a renewed challenge to the premises of the welfare state that has muddied the ideological waters; for example, see CHARLES A. MURRAY, *LOSING GROUND* (1984). On this debate, see generally GOODIN, *supra* note 40, at 1-26, 229-359; THEODORE R. MARMOR ET AL., *AMERICA’S MISUNDERSTOOD WELFARE STATE* (1990); REMESH MISHRA, *THE WELFARE STATE IN CAPITALIST SOCIETY* (1990); REMESH MISHRA, *THE WELFARE STATE IN CRISIS* 1-64, 161-78 (1984). Even so, today “the propriety of a minimal welfare state is conceded all around, by politicians and political parties of all stripes.” GOODIN, *supra* note 40, at 16.

170. On this basis, Professor Goodin criticizes modern self-reliance theory as suffering from an internal moral contradiction. GOODIN, *supra* note 40, at 341-59; see also Wilhelm Ropke, *Reflections on the Welfare State*, in THE WELFARE STATE: SELECTED ESSAYS, *supra* note 169, at 172, 177. But some early commentators did attack intra-family wealth transfers as demoralizing to the recipients, given the ideal of individualism—a position taken, interestingly, by some prominent “self-made” men. ANDREW CARNEGIE, *THE GOSPEL OF WEALTH* 56-57 (Edward C. Kirkland ed., 1962); WEDGWOOD, *supra* note 28, at 232; Irving Fisher, *Some Impending National Problems*, 24 J. POL. ECON. 694, 711 (1916); Langbein, *supra* note 76, at 737-38.

171. GOODIN, *supra* note 40, at 353.

violate the moral imperative (such as it remains) of self-reliance.¹⁷² The *Restatement (Second) of Property* implicitly acknowledges this turn of the political weather vane. It drops from its list of objections to perpetual trusts any reference to the value of self-reliance.¹⁷³

Yet, at a deeper level, concern for self-reliance must flow from fears of the effects of dependency on behavior as well as from autonomous judgments about moral worth. Critics have often charged that the welfare state distorts the economic incentives of its citizens. To the extent that welfare programs provide comprehensive protection against poverty, they operate like a mutual insurance pool, cushioning against the costs of indolence and economic failure.¹⁷⁴ Yet such insurance simultaneously creates perverse incentives, either to relax efforts or to court failure, because part of the loss and risk is borne by others.¹⁷⁵ Confident that government will fly to the rescue of those in need, citizens of a welfare state may thus be tempted to work fewer hours, to save less of their earnings, and to take greater gambles with their financial resources or careers (human capital) than is socially desirable.¹⁷⁶ Nor are these the only potential difficulties raised by a government-sponsored mutual insurance pool. Such insurance also invites deception, known in the present context as welfare fraud.¹⁷⁷

As already noted, a discretionary trust can also function to provide a mutual insurance pool.¹⁷⁸ And while this attribute will likely appeal to beneficiaries, society suffers to the extent that beneficiaries modify their behavior in perverse ways. Here again, by analogy, lie potential grounds for the regulation of this variety of dead hand control.

172. See SMES, *supra* note 2, at 58 (criticizing the self-reliance argument against perpetual trusts as out of step with the welfare state ideal). Modern commentators have commended the spendthrift trust as a means of protecting the weak. George P. Costigan, Jr., *Those Protective Trusts Which Are Miscalled "Spendthrift Trusts" Reexamined*, 22 CAL. L. REV. 471 (1934); Note, *A Rationale for the Spendthrift Trust*, 64 COLUM. L. REV. 1323 (1964); cf. *supra* note 168. In addition, some commentators have posited a moral obligation to provide for one's immediate descendants. For a recent discussion, see Deborah A. Batts, *I Didn't Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 HASTINGS L.J. 1197 (1990).

173. 1 RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS 8-10 (1983).

174. The analogy appears, for example, in POSNER, *supra* note 12, § 16.4, at 465-66. *But cf.* GOODIN, *supra* note 40, at 159-60; WAGNER, *supra* note 155, at 64-65 (suggesting limits to the analogy).

175. This perverse incentive is what economists refer to as the moral hazard of insurance, and it is common to all forms of insurance. On the economic theory of moral hazard, see Mark V. Pauly, *The Economics of Moral Hazard: Comment*, 58 AM. ECON. REV. 531 (1968). Extending the problem generally to human interaction, see James M. Buchanan, *The Samaritan's Dilemma*, in ALTRUISM, MORALITY, AND ECONOMIC THEORY 71 (Edmund S. Phelps ed., 1975).

176. Such observations are centuries old, originating in the political theory of poor relief. GOODIN, *supra* note 40, at 229-31. For a reference to the moral hazard of state welfare with respect to career choices, see PIGOU, *supra* note 28, at 491-92.

177. See, e.g., MARTIN ANDERSON, WELFARE 160-61 (1978).

178. See *supra* note 153 and accompanying text.

The problem, however, may be less serious than some would believe. Empirical evidence gathered to date suggests that the ill effects of welfare programs on their recipients' conduct, though real, are not so significant as critics had anticipated.¹⁷⁹ While *homo economicus* responds rationally to parasitic opportunity, *homo psychologicus* may cling instead to habits of labor, thrift, and caution engrained earlier in life.¹⁸⁰ Indeed, within the confines of the communal family (which can also resemble a mutual insurance pool),¹⁸¹ children have often been known to *rebel* against lifelong dependency, to break out on their own.¹⁸² The implications for the behavior of discretionary trust beneficiaries (as yet unstudied) are encouraging.

Furthermore, to the extent that discretionary trusts do create perverse incentives, these may be weaker than those that burden a welfare state. Intriguingly, little commonwealths may develop more effective immune systems against parasitic activity than big ones do. Communal families possess the detailed knowledge, monitoring capacity, and administrative flexibility necessary to deter detrimental conduct. Provided they are minded to do so, parents can threaten children who "misbehave" with strategic retaliation.¹⁸³ And because the cost of information within a family is relatively low, the risk of fraudulent claims of need likewise declines. A welfare state, by contrast, operates under conditions of relative ignorance and must follow rigid procedures and guidelines for aid eligibility that by and large preclude parental techniques of controlling recipients' behavior.¹⁸⁴

179. See generally GOODIN, *supra* note 40, at 233-35, 338-41; MARMOR ET AL., *supra* note 169, at 57-69, 141-44, 219-22; Sheldon Danziger et al., *How Income Transfer Programs Affect Work, Savings and the Income Distribution: A Critical Review*, 19 J. ECON. LITERATURE 975 (1981) (synthesizing earlier studies); Dean R. Leimer & Selig D. Lesnoy, *Social Security and Private Saving: New Time-Series Evidence*, 90 J. POL. ECON. 606 (1982); Martin S. Feldstein, *Social Security and Private Saving: Reply*, 90 J. POL. ECON. 630 (1982). The recent travails of the Federal Deposit Insurance Corporation amply demonstrate, however, that in certain instances and under proper conditions the problem of moral hazard can become well-nigh catastrophic.

180. The psychological literature is reviewed briefly in GOODIN, *supra* note 40, at 355-57.

181. This aspect of family economy is elaborated in Laurence J. Kotlikoff & Avia Spivak, *The Family as an Incomplete Annuities Market*, 89 J. POL. ECON. 372 (1981).

182. For a brief generalized discussion, see BOULDING, *supra* note 31, at 99-100.

183. Discussing the problem of moral hazard in the context of the communal family, see Neil Bruce & Michael Waldman, *The Rotten-Kid Theorem Meets the Samaritan's Dilemma*, 105 Q.J. ECON. 155 (1990). Tough-minded parents can threaten to reduce support stipends or bequests to children who shirk work, overspend, or take excessive risks. On strategic behavior, see LAURENCE J. KOTLIKOFF & ASSAF RAZIN, MAKING BEQUESTS WITHOUT SPOILING CHILDREN: BEQUESTS AS AN IMPLICIT OPTIMAL TAX STRUCTURE AND THE POSSIBILITY THAT ALTRUISTIC BEQUESTS ARE NOT EQUALIZING (National Bureau of Economic Research Working Paper No. 2737, 1988). But parents' feelings of benevolence toward their children could also lead them to a "soft-hearted" willingness to indulge their parasitic needs. Suggesting widespread disinclination to strategic behavior (soft-heartedness), see Buchanan, *supra* note 175, at 74-75, 83-84.

184. WAGNER, *supra* note 155, at 197-98 ("The welfare state . . . is not a superparent."). For this same reason, incidentally, the so-called Rotten Kid Theorem should not apply to the

Nor do state officials have an interest in exercising such control, even assuming it is feasible.¹⁸⁵

In one respect, a discretionary trust plainly resembles a communal family more than it does a welfare state. A trust operates on a relatively small scale and so can distribute flexibly and, if necessary, strategically.¹⁸⁶ This attribute is likely to endure even when the trust is prolonged, at least for several generations if not indefinitely.¹⁸⁷ The tougher question is whether discretionary trustees will be any more inclined than state officials to exercise parental influence over their charges. In the case of corporate fiduciaries, the answer almost certainly is no. "Don't rock the boat!" is the professional trustee's motto.¹⁸⁸ In the case of family member trustees, the issue may hinge on the closeness (both genealogical and social) of the family that the

welfare state. Under this theorem, selfish or envious children in a communal family will nonetheless maximize total family wealth and will not aid themselves to the greater harm of other children (*i.e.*, exploit intra-family "externalities") because their parents can be expected to adjust transfer payments to them and to harmed siblings to take into account their relative change of economic position. Gary S. Becker, *A Theory of Social Interactions*, in *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 253, 270 (1976); BECKER, *supra* note 83, at 287-96. But in a welfare state, eligibilities and benefits are insufficiently refined to prevent "rotten recipients" from seizing opportunities to aid themselves, at whatever cost to others. The scale of the welfare state, in other words, interferes both with the capacity for strategic behavior and with incentives that motivate members of a communal group to look out for the interests of the group as a whole.

185. WAGNER, *supra* note 155, at 173-76. In any event, discretion exercised by state officials might appear arbitrary and politically illegitimate. *Id.* at 197.

186. By the same token, the Rotten Kid Theorem should apply to a discretionary trust, assuming the trustee makes transfer payments on the basis of relative need. *See supra* notes 152, 184 and accompanying text.

187. Hypothetically, a discretionary family trust, like a welfare state, could encourage natural increase of the population of its beneficiaries by subsidizing the support of children. This procreative incentive is related to the more general "commons" dilemma in which persons overuse a free good or service available to all. *See generally* *MANAGING THE COMMONS* (Garrett Hardin & John Baden eds., 1977). (On the other hand, the barriers to immigration into a class of trust beneficiaries, surmountable only by marriage or adoption, are more daunting than those that insulate a welfare state.) Whether, in practice, fertility rates respond to communal protection remains unclear. *See* Mary J. Bane & Paul A. Jargowsky, *The Links Between Government Policy and Family Structure: What Matters and What Doesn't*, in *CHANGING AMERICAN FAMILY*, *supra* note 160, at 236-38.

188. The incentive to undertake strategic behavior in connection with a mutual insurance pool stems from utility interdependence. This exists in insurance firms (where moral hazard is reflected in company profits) and in families (where parents care about their children's welfare), but not in welfare states, where officials are time-servers and the costs of moral hazard are widely diffused. *See* WAGNER, *supra* note 155, at 173-74. Similarly, an independent trustee has no personal stake in forestalling parasitic behavior by trust beneficiaries, even though the welfare of the class of beneficiaries as a whole suffers by it. Indeed, in the case of a support trust, a trustee might be *obligated* to provide for beneficiaries, no matter how blatantly parasitic they become. A concerned testator might be able to build strategic behavior into the trustee's duties, say, by requiring her to assess the self-support efforts of beneficiaries as a factor in making discretionary distributions.

trust benefits, affecting in turn the trustee's willingness to deal with collateral relatives in parental ways.¹⁸⁹ As a family trust grows over time to encompass a more extended class of beneficiaries, that willingness is apt to wane.

However serious this problem is, we must bear in mind that the economic impact of welfare programs (of whatever size) is not unequivocal. Just as taxation is double edged—simultaneously prodding taxpayers to substitute leisure for their less-compensated efforts *and* to increase their exertions to make up the loss¹⁹⁰—so does benefaction have two sides. Recipients of aid may be tempted to ease their efforts, as we have noted, *or* they may receive the stimulus they need to begin to help themselves.¹⁹¹ In addition, welfare transfers can take the form of investments in human capital that are socially beneficial. Private investors tend to shy away from human capital due to various market imperfections.¹⁹² These same observations apply to trust beneficiaries. In particular, discretionary trusts would serve the public interest if they provided subsidies for human capital formation in family members. Family resources represent a traditional, and ultimately irreplaceable, reservoir for investment in human capital.¹⁹³

Finally, the welfare state and discretionary trusts should be viewed not only in contrast, but also in context. Given a prior political commitment to provide for the indigent, the proliferation of private discretionary trusts might serve the commonweal by reducing dependence on *public* safety nets

189. In the case of a family trustee, the inclination to behave strategically can arise out of the trustee's feelings of utility interdependence with the beneficiaries (both those who misbehave and those whose shares are diminished when misbehavior is subsidized), though these same feelings of benevolence could also lead the family trustee to soft-heartedness. *See supra* note 183.

190. *See, e.g.*, BLUM & KALVEN, *supra* note 157, at 21-23. These "two edges" of taxation are known technically as the "price effect" and the "wealth effect," respectively.

191. The point was recognized long ago by John Stuart Mill: "Energy and self-dependence are . . . liable to be impaired by the absence of help, as well as by its excess. . . . When . . . energies are paralyzed by discouragement, assistance is a tonic, not a sedative . . ." 2 MILL, *supra* note 25, at 468-69. (This notion also underlies the discharge in bankruptcy law. As a form of insurance against insolvency, the discharge potentially produces moral hazard. But it simultaneously "gives . . . [the] debtor . . . a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).) In addition, welfare assistance may prompt the recipient to what Professor Boulding calls "serial reciprocity," a desire to help others in turn (again, for an early anticipation of this idea, see ALIGHIERI DANTE, *ON WORLD GOVERNMENT OR DE MONARCHIA* 3 (Herbert W. Schneider trans., rev. ed. 1957) (ms. c. 1310)). And here, a "reciprocity multiplier" may even be involved. BOULDING, *supra* note 31, at 26-27; *see also* Alvin W. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25 AM. SOC. REV. 161 (1960).

192. GOODIN, *supra* note 40, at 154, 237-39; ALAN GORDON, *ECONOMICS AND SOCIAL POLICY* 76-90 (1982); GARY S. BECKER, *HUMAN CAPITAL* 78-80 (2d ed. 1975). Investment in human capital serves the public interest because it is, in a sense, a public good that promotes the economic growth of the nation as a whole.

193. *See, e.g.*, Langbein, *supra* note 76, at 729-39. This is not, however, an affirmative argument for permitting prolonged discretionary trusts, for assets alternatively inherited directly by the family would also probably be invested in human capital.

or subsidies (for example, financial aid for college), to the (limited) extent that relatively needy trust beneficiaries would otherwise rely on state assistance.¹⁹⁴ Often attended by cumbersome and costly bureaucracies, state aid programs constitute a less efficient means of delivering support than private family trusts.¹⁹⁵

In short, there appears to be no powerful argument, premised either on wealth maximization or broader considerations of private and public welfare, for lawmakers to regulate flexible distribution restrictions tailored to cover a nuclear family and its descendants. When imposing such a restriction, the dead hand's grip remains sufficiently loose as to be innocuous, or even benign.

III. IMPLICATIONS AND APPLICATIONS

All of which brings us to the state of the law.

The regulation of future interests is today mainly a function performed by the Rule against Perpetuities. Essentially, the Rule operates to cut short a future interest chain that could persist for longer than the lives of those persons who are living when the interest is created, plus twenty-one years.¹⁹⁶ This boundary applies irrespective of the qualitative attributes of the future interest at issue.¹⁹⁷ Accordingly, a testator can drag out dead hand control to the same limit under the Rule, no matter what qualitative restrictions she chooses to impose. Neither the model statutory Rule proposed by the

194. Because prolonged discretionary trusts de-stratify wealth within a family, *see supra* text accompanying note 163, trust distributions may replace state aid more often than if trust assets had instead been inherited directly by the family. Some testators, however, create "supplemental needs trusts" to take advantage of concurrent opportunities for state assistance. Cases conflict over whether trustees of a discretionary trust are obliged to make distributions that will substitute for state aid. For a recent discussion, see Clifton B. Kruse, *Welfare Without Guilt: Benefiting from a Supplemental Needs Trust*, 5 PROB. & PROP., May-June 1991, at 33.

195. The relative efficiency of public and private assistance programs remains controversial, however. *Cf. GOODIN, supra* note 40, at 239-45, 325-27, 343-49; GORDON, *supra* note 192, at 168-76; WAGNER, *supra* note 155, at 170-76, 196-98; ROPKE, *supra* note 170, at 177-78. On the relative ability of public and private assistance programs to avoid moral hazard, *see supra* notes 183-89 and accompanying text. Making a similar argument in connection with the discharge in bankruptcy (which shifts the cost of insolvency from the welfare state to creditors) is Jackson, *supra* note 96, at 1401-04. *See also* Becker & Tomes, *supra* note 164, at S156 (suggesting that the efficiency of state aid is diminished by its tendency to reduce private family redistributions that would occur in its absence).

196. *See generally* Leach, *supra* note 10; Dukeminier, *Guide, supra* note 4.

197. Analysis under the Rule will vary depending upon whether an interest is deemed vested or contingent, and the qualitative characteristics of a future interest can affect that determination. Nevertheless, because a testator can specify the lives in being that will be used to measure the longevity of a future interest, dead hand control over any qualitative element can, with proper drafting, be extended for the same amount of time. Criticizing generally the Rule's analytical focus on the vested/contingent dichotomy, *see* Daniel M. Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?* (pts. 1 & 2), 56 MICH. L. REV. 683, 887 (1958).

Uniform Law Commissioners nor the revised common law Rule proffered by the Restaters strays from this equation.¹⁹⁸

The expediency of such a "one size fits all" approach to perpetuities policy is, at the very least, debatable. As we have shown, different sorts of dead hand control press upon the world in different ways. Consider, for example, use restrictions and distribution restrictions. A use restriction can directly impair the value of property.¹⁹⁹ Its radiations are powerful and draining. By comparison, the wealth consequences of a distribution restriction, stemming from transaction costs and risk aversion, are secondary and ambiguous.²⁰⁰ While the prospect of arbitrariness provides a rationale for their limitation, intergenerational distribution restrictions also bring benefits in the form of increased wealth conservation.²⁰¹ Viewed broadly, distribution restrictions appear less burdensome than restrictions that funnel wealth into the provision of specific goods and services. In this day and age, goods and services can become redundant overnight; but when money loses its appeal the field of future interests will truly have been overtaken by events.

Certainly, a case can be made for regulating use restrictions more stringently than distribution restrictions.²⁰² And lawmakers could layer such regulations in a variety of ways. Further durational limits could be tacked on to the Rule against Perpetuities, specifically aimed at curtailing use restrictions. Most simply, these could be made unenforceable after a designated number of years.²⁰³ Alternatively, current durational regulations could be left in place, and other types of rules could be set alongside them.

198. Under the Uniform Statutory Rule against Perpetuities, a flat 90 year period can serve as a surrogate for the limit imposed by the common law Rule. UNIF. STAT. R. AGAINST PERPETUITIES § 1(a), 8A U.L.A. 350-51 (Supp. 1992). The Restatement applies a more conventional version of wait-and-see. 1 RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 1.4 (1983).

199. See *supra* text accompanying notes 69-71. Likewise, conduct restrictions can impair the value of the bequest to the extent that they mandate "costly" behavior. These should be treated as equivalent to use restrictions for purposes of qualitative analysis. See *supra* notes 67-68, 70.

200. See *supra* text accompanying notes 129-42.

201. See *supra* text accompanying notes 143-47.

202. Under the Rule in its common law form, the opposite can be true: use restrictions (and conditional bequests) can be drafted to *outlive* distribution restrictions, by combining a fee simple determinable (conditioning continued possession on abiding by the specified use or condition) with a possibility of reverter in the grantor's estate. Both interests are deemed vested and are therefore immune to the operation of the Rule. Dukeminier, *Guide, supra* note 4, at 1905-06. This anomaly has long been criticized, and a number of states have limited the duration of fees simple determinable by statute. *Id.* at 1907 & nn.139-40.

203. This simple approach has been taken by the several states that acted to limit the duration of fees simple determinable, see *supra* note 202, although the relevant statutes do *not* apply to use restrictions and conditional bequests imposed within fees simple subject to a condition subsequent, where violation of the condition operates to defease the beneficiary in favor of a third party holding a shifting executory interest (as opposed to a possibility of reverter in the grantor). These restrictions continue to be governed by the Rule against Perpetuities.

Lawmakers might, for example, levy an estate tax on use restrictions. A tax of this sort would respond more flexibly to the utilities of individual testators, allowing those willing to pay for the privilege to prolong this more invasive form of dead hand control.²⁰⁴ In the alternative (or in addition), lawmakers could apply a version of *cy pres* to use restrictions, permitting beneficiaries to petition for relief from a use restriction that becomes unduly burdensome.²⁰⁵ Such a rule already exists to curb the use restriction's managerial analogue, administrative directives for the preservation of specific investments.²⁰⁶ This approach would attack the other end of the problem, responding flexibly to the future disutilities of individual beneficiaries.

When one turns to instances in which the testator clothes a delegate with discretion to invest and/or distribute property, the social product of the estate plan switches from paralysis to restraint. So long as the scope of discretion is broadly defined, as when the testator imposes a trust without further managerial trammels or a special power of appointment that comprehends an entire family, the estate plan lacks arbitrariness and could even provide some benefits. Here, paradoxically, the dead hand's clasp can play

204. Anecdotal evidence suggests that testators are highly responsive to the tax consequences of alternative estate plans. See Dukeminier, *Uniform Rule*, *supra* note 4, at 1039 n.34, 1045 n.48, 1076 n.149; see also Frazer, *supra* note 111, at 16. Some commentators have suggested that an estate tax linked progressively to the duration of future interests could even substitute for the Rule against Perpetuities. Leonard Levin & Michael Mulrone, *The Rule Against Perpetuities and the Generation-Skipping Tax: Do We Need Both?*, 35 VILL. L. REV. 333, 356-60 (1990). For an early proposal along these lines, see 2 TAUSSIG, *supra* note 78, at 301-02.

205. Legislation in a few American jurisdictions permits courts (on petition) to modify trusts or terminate them prematurely, thereby effectively nullifying use restrictions. CAL. PROB. CODE § 15409(a) (West 1991); MO. ANN. STAT. § 456.590.2 (1992); N.Y. EST. POWERS & TRUSTS § 7-1.6 (McKinney 1992); OHIO REV. CODE ANN. § 1339.66 (Anderson Supp. 1991); PA. CONS. STAT. § 6102(a) (Supp. 1992); WIS. STAT. ANN. § 701.13(3) (West 1981). Nevertheless, most states continue to follow the doctrine enunciated in *Claffin v. Claffin*, 20 N.E. 454 (Mass. 1889), requiring strict compliance with the terms of private trusts. See generally Bird, *supra* note 130. For commentary advocating *cy pres* for private trusts, see POSNER, *supra* note 12, § 18.6, at 512; Paul G. Haskell, *Justifying the Principle of Distributive Deviation in the Law of Trusts*, 18 HASTINGS L.J. 267 (1967); Wiedenbeck, *supra* note 60; Douglas G. Hyde, Note, *Variation of Private Trusts in Response to Unforeseen Needs of Beneficiaries: Proposals for Reform*, 47 B.U. L. REV. 567 (1967). But see Macey, *supra* note 91, at 300-03, 314-15. Again, some commentators have argued that broad *cy pres* powers could substitute for the Rule against Perpetuities, an approach taken in the Canadian province of Manitoba. R.S.M. chs. 38, 43 (1982-84); Ruth Deech, *The Rule Against Perpetuities Abolished*, 4 OXFORD J. LEGAL STUD. 454 (1984); Wiedenbeck, *supra* note 60, at 834-38. But see Jane Glenn, *Perpetuities to Purefoy: Reform by Abolition in Manitoba*, 62 CANADIAN B. REV. 618 (1984).

206. On this rule, known as the doctrine of administrative deviation, see 2A SCOTT, *supra* note 90, § 167. Given their invasiveness and social costs, trusts requiring investment preservation could also reasonably be made subject to a special short durational limitation or to a special tax, as discussed in connection with use restrictions. See *supra* notes 105, 202-04 and accompanying text.

a constructive role by refusing to yield to the narrow interests of subsequent living hands.²⁰⁷

When a testator places a future interest in trust, beneficiaries and society both profit by the property's enhanced marketability.²⁰⁸ On balance, beneficiaries are also likely to prefer continuous control by a fiduciary to serial control by non-fiduciaries because serial control would provide weaker assurances against mismanagement.²⁰⁹ Nevertheless, when a trust contains inflexible restrictions as to use or distribution, the private costs associated with those forms of control still remain. Diminished value and arbitrariness would continue to justify the regulation of such trusts, although, given their avoidance of corpus marketability problems, they arguably deserve greater tolerance than their out-of-trust equivalents.²¹⁰

207. See *supra* text accompanying notes 114, 146, 157-63. This point has largely, but not entirely, eluded scholars. Professor French appears to apprehend the idea when, in the course of addressing whether "long-term trusts [are] good or harmful for society or for families," she opines that "[a] well drafted trust can provide a stable but flexible financial base for a family, as well as a source of forced savings for the economy." Susan F. French, *Perpetuities: Three Essays in Honor of My Father*, 65 WASH. L. REV. 323, 350-51 (1990).

208. See *supra* text accompanying notes 112-13. At the same time, an investment restriction that limits managerial discretion within a trust can generate costs independent of those associated with whatever distribution or use restrictions attach to the trust. See *supra* notes 105, 206 and accompanying text. Under current law, the testator who creates a trust is free to add whatever managerial limitations she chooses; but if she limits the trustee's power to sell trust assets, the doctrine of administrative deviation may subsequently operate to override the limitation. See *supra* note 206. The testator is also free to waive all managerial limitations; in default of an expression of testamentary intent, the trustee can trade trust assets but must follow the Prudent Person Rule when investing the corpus of the trust. While several versions of the Prudent Person Rule are extant, the new Restatement formulation requires (under most circumstances) portfolio diversification to reduce specific risk, a strategy that will probably appeal to most beneficiaries without deleterious social side effects. RESTATEMENT OF TRUSTS (THIRD) § 227 (1992); see *supra* notes 116-19 and accompanying text; see also 3 SCOTT, *supra* note 90, §§ 190, 227.5-6, 227.14. See generally POSNER, *supra* note 12, § 15.6, at 439-42. For a recent critical analysis of the Restatement revisions, see Paul G. Haskell, *The Prudent Person Rule for Trustee Investment and Modern Portfolio Theory*, 69 N.C. L. REV. 87 (1990). Given their likely coincidence with beneficiaries' preferences, trusts subject to the Prudent Person Rule (at least in its latest incarnation) should be treated no differently from unrestricted investment trusts under the Rule against Perpetuities.

209. See *supra* note 114 and accompanying text.

210. Cf. *supra* note 76 and accompanying text. Professor Leach observed that the Rule against Perpetuities was extended from real property to trusts "without discussion or recognition of these differences." 6 AMERICAN LAW OF PROPERTY, *supra* note 86, at 16. Professor Haskell has proposed the establishment of separate durational limits for future interests in and out of trust. Haskell, *supra* note 12, at 548-49. Several American states have passed statutes distinguishing future interests on this basis. In Delaware, the Rule against Perpetuities does not apply to trusts, which are nonetheless required to terminate no later than 110 years after their creation. DEL. CODE ANN. tit. 25, § 503 (1989). In Idaho, South Dakota, and Wisconsin, trusts where the trustee has power to alienate trust assets (and also legal estates where the possessory beneficiary has a power of sale) are permitted to persist in perpetuity. IDAHO CODE § 55-111 (1988); S.D. CODIFIED LAWS ANN. §§ 43-5-1, 43-5-8 (1983); WIS. STAT. ANN. § 700.16 (West 1981 & Supp. 1990). The latter trilogy of statutes, ostensibly applying even to use-restricted and conditional trusts, seems to blow out of proportion the policy distinction between

In contrast, when a bequest incorporates broadly flexible provisions for investment *and* distribution—for instance, a discretionary trust encompassing the testator's spouse and all descendants—no clear justification for regulation appears. A trust of this sort should neither depress value nor foster arbitrariness; indeed, it can affirmatively benefit a family by providing its members with comprehensive insurance against need, while availing society by spreading wealth more equally within that group.²¹¹ Arguably, lawmakers should permit discretionary family trusts to persist, *even in perpetuity*.²¹²

This is not to say that a discretionary family trust could never outlive its usefulness. Over time, the pool of beneficiaries (and attendant administrative costs) might grow so large relative to the corpus that the trust becomes worthless—a “nuisance trust.”²¹³ Were discretionary family trusts exempted from the Rule against Perpetuities, lawmakers would do well to leave open an avenue for termination by court order.²¹⁴ Still and all, such a trust could continue to serve the interests of a family past “lives in being plus twenty-one years.”

Some might take exception to the testator's motives for prolonging a discretionary family trust. The object of hoisting a privileged dynasty onto society or of engendering eternal filio piety may strike the mind as unseemly, to say the least.²¹⁵ That could be considered reason enough to rein in the

legal and equitable interests (although the statutes' application to legal estates coupled with a power of sale—a device analogous to the trust, to the extent that it avoids marketability problems—is thematic, see *supra* text accompanying notes 112-16).

211. See *supra* text accompanying notes 152-95. Discretionary support trusts also fit into this category. See *supra* note 152. Whether long-term discretionary trusts that make inflexible intergenerational distribution decisions (*i.e.*, that fix the amount of income and/or principal that each generation receives, without dictating distribution within each generation) ought as well to be free from regulation is unclear. If one accepts the argument, offered earlier, that reasoned intergenerational allocations are impossible *even by the living*, then discretionary trusts that include intergenerational allocations are unobjectionable; they even provide the added benefit of enforced saving *without* the harmful side effect of arbitrary intragenerational distributions. See *supra* notes 145-47 and accompanying text. Professor Simes (and Lord Hobhouse before him) objected to intergenerational allocations, however, suggesting that regulation is again appropriate. See *supra* note 145. At any rate, so long as a discretionary trustee is given power to both invade principal and accumulate income, this potential objection to prolonged discretionary trusts disappears. See *supra* note 148.

212. Under the common law Rule against Perpetuities, by contrast, discretionary trusts are *more* vulnerable to rule violations than are trusts that fix the distributions of beneficiaries, because the former create interests that remain unvested until distribution, whereas the latter create interests that remain unvested only until birth. See Dukeminier, *Guide*, *supra* note 4, at 1904-05. (Still, properly drafted, discretionary trusts can last as long as trusts mandating inflexible plans of distribution.)

213. Minturn T. Wright, III, *Termination of Trusts in Pennsylvania—Some Current Trends*, 115 U. PA. L. REV. 917, 926 (1967).

214. California has a statute specifically directed to the termination of trusts on petition where their continuation has become uneconomical. CAL. PROB. CODE § 15408 (Deering 1991); see also the statutes cited *supra* note 205.

215. See *supra* notes 52, 128 and accompanying text. The testator might also hope to

dead hand.²¹⁶ But to prise open a trust only because its architect fancied herself an "empire builder"²¹⁷ would be to give cosmetic considerations undue weight. The fact remains that a discretionary family trust offers potential social utilities, without causing any clear harm.²¹⁸ Actions that benefit others do not become less beneficial when undertaken for ignoble reasons.²¹⁹ Here is one instance where lawmakers could with equanimity step aside and indulge the testator's wish to erect a monument to her own vanity.²²⁰

CONCLUSION

This Article has called for a more refined outlook on the problem of the dead hand. Depending on the mix of restrictions that a testator presumes to impose, the future interests she creates may translate into bane or (just possibly) boon for those who follow in her path. Time, as they say, is of the essence, but the quality of time matters too. For all its technical complexity, the Rule against Perpetuities is curiously simple minded when it comes to treating qualitative variations of dead hand control. Lawmakers should take those variations into account, or at least into consideration, when setting perpetuities policy.

Specifically, three substantive distinctions stand out as fit subjects for renewed scrutiny. The general application of traditional longevity constraints

encourage the numerical increase of her family. *See supra* note 187. Lord Hobhouse conjectured simply that the power of dead hand control "is very commonly exercised to its fullest extent, merely because it exists, and without the slightest reason beyond the pleasure of exercising power." HOBHOUSE, *supra* note 2, at 183; *see also* GULLIVER, *supra* note 2, at 16; Alexander, *supra* note 65, at 1218 n.78.

216. *See* Professor Leach: The Rule against Perpetuities "should be a check on vain, capricious action by wealthy empire builders." 6 AMERICAN LAW OF PROPERTY, *supra* note 86, at 43. Vain, the extension of a discretionary family trust might be; capricious, it is not.

217. *Id.*

218. Conceivably, the very prolongation of a family's wealth could be deemed an objectionable feature of perpetual trusts. Dean Gulliver described the Rule against Perpetuities as "a sort of private anti-trust law." GULLIVER, *supra* note 2, at 16. Yet, given the alternative of testamentary transfer at each generation, a discretionary family trust does not operate clearly to stratify wealth over time and could in fact have the opposite effect. *See supra* text accompanying notes 157-63. At any rate, the federal Generation-Skipping Transfer Tax is now the primary line of defense against intergenerational wealth concentrations, and further modifications could be made to the tax to ensure adequate taxation of prolonged trusts. *See generally* Ira Bloom, *Transfer Tax Avoidance: The Impact of Perpetuities Restrictions Before and After Generation-Skipping Taxation*, 45 ALB. L. REV. 261 (1981); Levin & Mulroney, *supra* note 204; *see also* SIMES, *supra* note 2, at 57; Leach, *supra* note 2, at 1136, 1141-42.

219. *But see* T.S. Eliot's Thomas Becket: "The last temptation is the greatest treason: To do the right deed for the wrong reason." T.S. ELIOT, *MURDER IN THE CATHEDRAL* 44 (1935).

220. Also, consider the possible substitute outlets for such vanity. Ezra Stiles, an early president of Yale College, planned to bequeath funds for a *literal*, fifty-foot monument to himself, "somewhat in Resemblance of the Ancyran Marble of Augustus Caesar." EDMUND S. MORGAN, *THE GENTLE PURITAN* 164 (1962). On Stiles's estate plan, *see id.* at 163-65.

even to inflexible instructions as to use²²¹ is one policy that merits attention. Mere intuition suggests that a right to stipulate the use of property *for nearly a century*²²² is of doubtful social utility. In addition, the failure of perpetuities law to distinguish trusts from legal estates in property appears problematic on its face. Again, the prospect of land left underutilized for close to a hundred years due to high transaction costs should suffice at least to raise legislative eyebrows. On the other hand, flexibly drafted discretionary trusts implicate none of the traditional justifications for tying the dead hand. Trusts of this sort could be released *even from existing limits* on the duration of future interests without disserving public policy.

In short, attention to the variations of dead hand control suggests that in some respects perpetuities law needs tightening; in others it could be looser still. But as of yet, lawmakers have failed to *conceive* of the problem of future interests in qualitative terms. The whole area calls for fundamental rethinking.²²³

That lawmakers have indeed neglected to think much or deeply about future interests may be symptomatic of more rudimentary ills. What Dean Gulliver called the "hero-worship of stare decisis"²²⁴ has long infected this body of law.²²⁵ The field remains notorious for its fealty to feudal formalisms

221. Likewise, inflexible conduct restrictions that modify the behavior of beneficiaries fit into this category.

222. Under the Uniform Statutory Rule against Perpetuities, future interests of all sorts are permitted to endure for 90 years. See *supra* note 198. Under the common law Rule, their endurance cannot be so precisely dated, but by the use of extraneous measuring lives similar longevity is achievable. Dukeminier, *Uniform Rule*, *supra* note 4, at 1029-34.

223. One possible fundamental change of approach would be to set a more flexible, equitable standard for the regulation of dead hand control. Lord Chancellor Nottingham had that in mind in the seminal *Duke of Norfolk's Case*, when he ruled future interests invalid "wherever any visible Inconvenience doth appear; for the just Bounds of a Fee-simple upon a Fee-simple are not yet determined." *Duke of Norfolk's Case*, 22 Eng. Rep. 931, 960 (Ch. 1682). Only later did this criterion of decision (as so often happens) harden into a rule of law. Yet, in a recent opinion, the Supreme Court of Mississippi made noises that, remarkably, hark back to Nottingham: the Court observed that "Our cases have not yet fleshed out the meaning of our wait-and-see doctrine," and it refused to define "the outer limits of wait-and-see." Throughout, the judges heaped scorn on Professor Gray's technical approach to the Rule, insisting that "[w]e need not sacrifice civil justice on the altar of legal formalism or the purist's nostalgia." *In re Estate of Anderson*, 541 So. 2d 423, 433 & n.20 (Miss. 1989). *Quaere*, however, whether an equitable approach to perpetuities would impose too large a cost in terms of increased uncertainty and litigation-breeding.

224. GULLIVER, *supra* note 2, at 12.

225. See generally *id.* at 1-14; Jesse Dukeminier, *Cleansing the Stables of Property: A River Found at Last*, 65 IOWA L. REV. 151 (1979). The titles tell it all: W. BARTON LEACH, *PROPERTY LAW INDICTED! OR THE PEOPLE VS. BLACKSTONE, KENT, GRAY, AND STARE DECISIS (ACCESSORIES: PONTIUS PILATE AND THE LAWS OF THE MEDES AND THE PERSIANS)* (1967) (easily one of the most audacious law books of all time); William F. Fratcher, *Exorcise the Curse of Reversionary Possibilities*, 28 J. MO. B. 34 (1972); Wythe Holt, *The Testator Who Gave Away Less Than All He or She Had: Perversions in the Law of Future Interests*, 32 ALA. L. REV. 69 (1980); Taylor Mattis & David Schellenberg, *The Doctrine of Worthier Title in Illinois: Burying the Dead*, 23 J. MARSHALL L. REV. 81 (1989); Ronald Maudsley, *Escaping the Tyranny*

and its reverence for aged, if not antediluvian, precedents. Commentaries on the Rule against Perpetuities have been livelier than the opinions, but even these have often missed the forest for the trees. Too many pages have been filled with technical abstraction—driving many a poor soul to the brink of distraction.²²⁶

Of course, in veering away from substance, future interests law has traveled a well-worn road. Overburdened judges have always found it easier to subsume questions of policy within mechanical formulas, formulas that can in turn lull subsequent judges into the comfortable assumption that policies left unstated need no review. That, alas, is the path of least resistance. What appears unusual, if not unique, about future interests law is the extent to which some jurists have become fairly *intimidated* by the prospect of change. Having spun out their webs of logic (or casuistry?), lawmakers have hesitated thereafter to disturb them, lest they unravel before their eyes. The image is, in its own way, an elegant one. William Blackstone warned that “[t]he law of real property in this country is . . . now formed into a fine artificial system, full of unseen connections and nice dependencies; and he that breaks one link in the chain, endangers the dissolution of the whole.”²²⁷ Ostensibly “no blind admirer of the Rule against Perpetuities,” John Chipman Gray nonetheless shuddered at the thought of meddling with his predecessors’ handiwork. Gray agreed that “[i]t is a dangerous thing to make . . . a radical change in a part of the law which is concatenated with almost mathematical precision. . . . In [1828] the reviewers [in New York] undertook to remodel the Rule against Perpetuities, and what a mess they made of it!”²²⁸ More recently still, Judge Learned Hand paid homage to the delicate artistry of future interests law. “I am quite aware that this is all largely [a] matter of words,” Hand conceded, “but so is much of the law of property; and unless we treat such formal distinctions as real, that law will melt away and leave not a rack behind.”²²⁹

of Common Law Estates, 42 MO. L. REV. 355 (1977); Nicholas L. White, *Bringing Tennessee into the Twentieth Century Re Possibilities of Reverter, Powers of Termination and Executory Interests When Used as Land Control Devices*, 15 MEM. ST. U. L. REV. 555 (1985); Robert R. Wright, *Medieval Law in the Age of Space: Some “Rules of Property” in Arkansas*, 22 ARK. L. REV. 248 (1968); Charles M. Agee, Jr., Note, *Has Tennessee Abolished Its Ancient Class Gift Doctrine or Only Modified It?*, 7 MEM. ST. U. L. REV. 129 (1976). And so on.

226. No less of a devotee than Professor Leach could grow weary. He wondered aloud whether “anyone ever read Gray through.” Leach, *supra* note 10, at 638. But do we, the “jurisprudish” physicians, also need to heal ourselves? See *supra* note 5.

227. *Perrin v. Blake* (Exch. 1772), reprinted in FRANCIS HARGRAVE, A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 487, 498 (London 1787) (upholding the rule in Shelley’s Case (1581)). Discussing the Rule against Perpetuities in similarly apocalyptic terms at around the same time, see *Thellusson v. Woodford*, 31 Eng. Rep. 117, 162 (Ch. 1799) (Buller, J.).

228. GRAY, *supra* note 2, §§ 869-71, at 757. On Gray’s contribution to the reification of the Rule, see Stephen A. Siegel, *John Chipman Gray, Legal Formalism, and the Transformation of Perpetuities Law*, 36 U. MIAMI L. REV. 439 (1982).

229. *Commissioner v. City Bank Farmers’ Trust Co.*, 74 F.2d 242, 247 (2d Cir. 1934)

This is alarmism, pure and simple.²³⁰ If history discloses anything, it is the remarkable durability and adaptability of legal culture.²³¹ Rules come and go; there is always something left behind. (And in that, too, one may spy a certain elegance.) No less than other areas, the law of future interests must be free to bend with the social breezes of a world that has buried (or sought to bury) the forms of action along with decedent testators. Indeed, only by obstructing such evolution could lawmakers, in the end, invite trouble.

That the Rule against Perpetuities has in fact proven troublesome is no great secret. Many have criticized the Rule for its caprice.²³² We would criticize it for its reductionism. At the end of the day, ours may not be the more damning reproof. After all, legal scholars have discerned great virtues in simplicity.²³³ Still, being *simple* and being *simplistic* are two different things.²³⁴ However lawmakers see fit to weigh such matters is, for present

(Hand, J., dissenting). Others have sounded less strident notes of caution. *E.g.*, SIMES, *supra* note 2, at 71-72; Leach, *supra* note 14, at 748-49; Philip Mechem, Comment, *Further Thoughts on the Pennsylvania Perpetuities Legislation*, 107 U. PA. L. REV. 965, 965-67, 983. *But cf.* Duke of Norfolk's Case, 22 Eng. Rep. 931, 960-61 (Ch. 1682).

230. Perhaps we raise a bugaboo here. See, once again, the delightfully irreverent opinion in *In re Estate of Anderson*, 541 So. 2d 423 (Miss. 1989). Certainly, the state of future interests law has much improved in recent decades. Nonetheless, we think the point worth belaboring. Overall, courts (if not legislatures) still tend to cling to tradition in this area—even when they recognize its inexpedience. As the Superior Court of Connecticut observed, "exaltation of verbalism over substance has been criticized, but it is rigidly adhered to in the legalistic sophistry which comprises much of the lore of future interests." *Second Nat'l Bank of New Haven v. Harris Trust and Savings Bank*, 283 A.2d 226, 229 (Conn. Super. Ct. 1971).

231. Nevertheless, there have been a few occasions in history when legal culture nearly cracked. *See, e.g.*, S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 358-61 (1969) (discussing the disarray following abolition of trial by ordeal).

232. *E.g.*, *Estate of Anderson*, 541 So. 2d at 433 n.22; 6 AMERICAN LAW OF PROPERTY, *supra* note 86, at 16, 33-37; MCGOVERN ET AL., *supra* note 35, at 509; SIMES, *supra* note 2, at 64-65, 70-71; Haskell, *supra* note 12, at 550; Leach, *supra* note 14, at 722; Scott, *supra* note 45, at 639-42. This criticism has echoed for some time, for example, Charles Sweet, *The Monstrous Regiment of the Rule Against Perpetuities*, 18 JURID. REV. 132, 155-58 (1906). The Uniform Statutory Rule against Perpetuities attends to the complaint, though some believe the cure is worse than the disease. *See* Dukeminier, *Uniform Rule*, *supra* note 4.

233. *See generally* Edward C. Halbach, Jr., *Toward a Simplified System of Law*, in *LAW AND THE AMERICAN FUTURE* 143 (Murray L. Schwartz ed., 1976); Janice Toran, *'Tis a Gift to Be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352 (1990). In connection with the Rule against Perpetuities, see SIMES, *supra* note 2, at 100, 108-09; GRAY, *supra* note 2, § 782, at 716-17; Fellows, *supra* note 4, at 654-55; Leach, *supra* note 14, at 721-23. *But cf.* Stake, *supra* note 131, at 756-59 (arguing that complexity with regard to the Rule is a virtue per se); Dukeminier, *Uniform Rule*, *supra* note 4, at 1057 (same, on different grounds). One "cost" of the Rule's complexity is the not infrequent tendency of courts to misapply it. *See, e.g.*, Bloom, *supra* note 4, at 59-62. It is often said that hard cases make bad law. As judicial wrestling with the Rule illustrates, the maxim can be reversed: hard law makes bad cases!

234. As Einstein put it, "Everything should be made as simple as possible, but not more so." Albert Einstein, *quoted in* BURTON G. MALKIEL, *A RANDOM WALK DOWN WALL STREET* 210 (4th ed. 1985) (on Einstein, *cf.* Toran, *supra* note 233, at 352-53); *see also supra* note 14. In connection with the Rule against Perpetuities, see Thomas L. Waterbury, *Some Further Thoughts on Perpetuities Reform*, 42 MINN. L. REV. 41, 58 (1957) ("[I]ntricacy can be justified if necessary to the objectives of the rule . . .").

purposes, beside the point. The thrust of this Article has been to broaden the terms of the debate, by reconnoitering a flank of the future interests problem that has remained all quiet for too long. A first step only—but one that could provide the outline for a new strategy of assault against “the dead hand of John Chipman Gray.”²³⁵

235. *Estate of Anderson*, 541 So. 2d at 430.