“Gifts That Keep On Giving”

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NOTE FOR UCLA WORKSHOP PARTICIPANTS

The paper you’ll be reading is a work in progress. And you don’t have all of it. Professor Shiffrin has wisely set a limit to how much I can impose on you. I’ll just say a few words by way of background. I first started thinking about the issues raised by dynasty (potentially very long private trusts) a dozen years ago in preparation for a talk I had agreed to give. I was already doing research on the proper tax treatment, within a liberal egalitarian account of justice, of gifts that are passed down many generations, usually along bloodlines, without being consumed. The question of whether it should be permissible to constrain the use of trust property over large stretches of time, as opposed to having property pass from one generation to the next when the choice to do so is made independently at each generational level, seemed an interesting complement to what I was already thinking about. The fact that the academic establishment found the notion both fearsome and contemptible while the estate planning world and its clients embraced it with gusto made me more curious.

Scholarly work in trust law tends not to be overtly philosophical. This is my evolving attempt to bring moral philosophical work to bear on this issue.

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GIFTS THAT KEEP ON GIVING

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Trust law tends to advance in a slow and stately way. Lawyers and fiduciaries need not struggle to keep pace. Over the last thirty years, however, the rules governing long-lived trusts have sprinted ahead. Until the mid-1980s, although it was technically possible in a couple of states to create a non-charitable trust for personal property that could run indefinitely,1 nobody seemed interested. Today, more than half the states have repealed durational limits on private trusts or extended the wait-and-see period of the Uniform Statutory Rule Against Perpetuities from 90 years to 360, 500, or even 1,000 years.2 Americans residing anywhere can apparently take advantage of these changes simply by establishing their trust in a permissive jurisdiction.3 Thousands of family trusts


3This assumption is almost universally shared, though it remains an assumption because the claim has so far not been litigated. It is possible that a settlor who is domiciled in a state that has retained the Rule Against Perpetuities could be barred from creating a trust that runs longer than the Rule in a state that permits trusts of longer duration. But the force of such a prohibition would seem to depend on the state of domicile having jurisdiction over the non-resident trustee, and if the non-resident trustee had no contact with that state, the trust’s administration would apparently lie beyond the court’s reach. See Joshua C. Tate, “Perpetual Trusts and the Settlor’s Intent,” 53 Kansas L. Rev. 595, 596 n.5 (2005).
capable of outlasting a century have been created, and many more can be expected to follow.

What explains the collapse of the Rule Against Perpetuities? And why have settlors embraced the opportunity to tie up assets until the United States splinter or the law reverts, when not so long ago donors seemed indifferent to that prospect? Scholars have quarreled about precisely why the Rule fell away and why dynasty\(^4\) trusts have become popular, but plainly a number of factors were and remain at work. The enactment of a generation-skipping transfer tax at the federal level in 1986, as an accompaniment to the newly unified gift and estate taxes, drew attention to the repeated taxation of gifted or bequeathed assets as donations moved down the chain of descendants, even if those assets generated no income. Estate planners and their clients noticed. Congress’s creation of an exemption to the generation-skipping transfer tax equal in amount to the exemption available under the gift and estate tax invited wealthy donors to exploit that opportunity. Lawyers, bankers, professional fiduciaries, and other service providers encouraged them to seize their chance.\(^5\) After all, the more complex trusts that had to be created and

\(^4\)The term “dynasty trust” is frequently used, and often pejoratively, to refer to trusts of exceedingly long or indefinite duration designed to benefit descendants of the settlor. A dynasty trust is a perpetual trust, but not all perpetual trusts are dynasty trusts. Charitable trusts, for example, usually are perpetual trusts exempt from the Rule Against Perpetuities because of the public good they allegedly do. Some noncharitable trusts purport to be perpetual but do not count as dynasty trusts, such as a trust to maintain a grave or to promote a cause the courts have not found to be publicly beneficial, such as the advancement of Esperanto.

\(^5\)See Ira Mark Bloom, “The GST Tax Tail Is Killing the Rule Against Perpetuities,” 87 Tax Notes 569 (Apr. 24, 2000); Grayson M.P. McCouch, “Who Killed the Rule Against Perpetuities?,” 40 Pepperdine L. Rev. 1291, 1300-1302 (2013). It remains mysterious why estate planners and allied professionals did not press for repeal of the Rule Against Perpetuities earlier, when the estate tax was even more onerous than it was following the Reagan administration’s major tax reform in 1986. It is equally mysterious why they and their clients did not fight harder to increase the amount exempt from gift and estate tax or to lower marginal rates before Ronald
managed and the more assets that were placed in trust, the more they stood to earn in fees. Because gifts up to the exempt amount would *never* be taxed until they were distributed and then passed on again by the distributees, the size of the tax advantage depended on how long assets were kept in trust. The longer, the better. To dilate that advantage, it was crucial to remove restrictions on trust duration. Professionals in one state after another lobbied state legislators to repeal those limits as a way to keep or retain trust business. Their pleas fell on receptive ears. Many influences converged. As Joel Reagan became President – though they made zealous efforts to repeal the so-called “death tax” in the decades following, culminating in the complete disappearance of the estate tax and the generation-skipping transfer tax for those dying in 2010. For an account of those battles, see Michael J. Graetz & Ian Shapiro, Death By A Thousand Cuts: The Fight Over Taxing Inherited Wealth (2005). The spirit of the times somehow shifted, not only in the consciousness of old money but among entrepreneurs and social conservatives increasingly distrustful of the government’s motives.

The Alaska Trust Company, a pioneer both in the design of dynasty and asset protection trusts and in crafting legislation designed to benefit its clients and of course its own business, provides the following example on its website: “If a family uses only $1 million of the GST [generation-skipping transfer tax] exemption, after 120 years with an after-tax return of 6%, the trust would be worth over $1 billion. If a trust was not used, the value of the property would be only about $68 million.” http://www.alaskatrust.com/about-us/the-alaska-advantage/ In 2016, the GST exemption stands at $5.45 million per person, not a mere $1 million. So, by this calculation, if the exemption were fully exploited, a settlor’s gift could swell to a corpus of nearly $6 billion in 120 years. A wealthy married couple could double that amount today. Of course, no trust company is predicting, let alone promising, a 6% return net of inflation, fees, and administrative expenses. And most settlors would want their trusts to make distributions, not simply accumulate earnings, which would significantly lower projections of value centuries hence. Note that the 120-year period in the example was carefully chosen to boost the total above $1 billion. Invest $1 million at 6% for 100 years and the total comes to (only) $340 million.

Limitations on the length of trusts have always been set by the states, not the federal government. Robert Sitkoff and Max Schanzenbach summarize their empirical findings as follows:

Our analysis indicates that, on average, through 2003 a state’s abolition of the Rule Against Perpetuities increased its reported trust assets by about $6 billion and its average
Dobris has pointed out, their urging came at a time when popular support for economic leveling had waned, when trust assets had become more liquid and both interstate and international competition for those assets had tightened, when campaign contributions had become even more important to politicians, and when the public had little awareness of how well the top tenth of one percent was doing and of the tax and non-tax strategies they employed to consolidate and multiply their holdings.

Of course, lawyers’ and bankers’ efforts would bear fruit only if wealthy individuals could be convinced to create dynasty trusts rather than simply leave all they had to their spouses or children. Fortunately for them, a sizable group bought the pitch. Perhaps they were actuated by an ancient dynastic impulse that had lain dormant in the American psyche but came to life when the right spark was applied. Perhaps the bare idea of saving on taxes sufficed, buoyed by unhappiness with how they saw Washington spending what they considered their money. Perhaps, as some estate planners’ advertisements suggest, the notion that dynasty trusts would benefit their creators’ trust account size by roughly $200,000. To put these figures in perspective, in 2003 the average state had roughly $19 billion in reported trust assets and an average account size of about $1 million. In the timeframe of our data, seventeen states abolished the Rule, implying that through 2003 roughly $100 billion in trust assets have moved as a result of the Rule’s abolition.


9See Mary Louise Fellows, “Why the Generation-Skipping Transfer Tax Sparked Perpetual Trusts,” 27 Cardozo L. Rev. 2511 (2006). As Ronald Chester reports, “Visions of European-style dynasties are being sold to the new rich, with such come-ons on a law firm’s website as ‘Dynasty trusts have a legacy as rich as European history itself.’” Ronald Chester, From Here to Eternity? Property and the Dead Hand 25-26 (2007).
descendants by shielding them from imprudent investments, dissipation, and grasping creditors persuaded them that kindness rather than a thirst for personal grandeur was their true motive.\textsuperscript{10} Whatever the exact constellation of causes, dynasty trusts became fashionable.

The academic response to their newfound popularity has been almost uniformly scornful. Put aside the fact that many (though by no means all) dynasty trusts are drafted in a way that allows beneficiaries to terminate the trust if all or a select group consent, substantially reducing the chance that they will run for centuries. The bare possibility that they will endure, and the likelihood that some will, has unleashed a torrent of outrage, disbelief, and fear.\textsuperscript{11} Dynasty trusts have been denounced as unfair to future people, administratively unwieldy, economically wasteful, inegalitarian, megalomaniacal, and symbolically threatening to democratic values. Critics see no upside. Not surprisingly, scholars have therefore proposed legal reforms to block new dynasty trusts and clip the wings of extant trusts.\textsuperscript{12} Some would resurrect the Rule Against Perpetuities in modern

\textsuperscript{10}Joel Dobris hypothesizes that some settlors might have opted for perpetual trusts after being sold on the supposed benefits to their children and grandchildren from asset protection and spendthrift provisions. Lawyers will gladly add duration-extending clauses at no extra charge. As he puts its: “If it’s happy hour, and doubles cost the same as singles, lots of folks will order a double.” Joel C. Dobris, “Undoing Repeal of the Rule Against Perpetuities: Federal and State Tools for Breaking Dynasty Trusts,” 27 Cardozo L. Rev. 2537, 2539 (2006).


\textsuperscript{12}See, e.g., Dobris, supra note [10] (surveying mechanisms for destroying dynasty trusts).
dress; others would endow remote beneficiaries with the power to terminate a trust regardless of what the settlor decreed. At the federal level, the Obama administration, while not claiming the power to regulate the longevity of trusts directly, has in the Treasury Greenbook called year after year for legislation to withdraw the generation-skipping trust exemption 90 years after a trust’s creation, thereby subjecting the corpus to taxation at the highest wealth transfer tax rate when its benefits flow to each subsequent generation.

My aim in this paper is to consider whether dynasty trusts are as baneful as their critics suggest. Both the public debate and to a large degree the academic discussion have lacked depth and detail, pitting bare assertions of private property rights against claims of collective authority, with the two sides often relying on unanalyzed assumptions about justice or ownership. In this paper I start at the beginning, with rival accounts of justice and public goals that could plausibly complement them, to see what they imply – to the extent that they yield any firm conclusions – with respect to limits on the duration of private, non-charitable trusts. With apologies for the shoehorning inseparable from broad categorizations, I explore libertarian, consequentialist, and liberal egalitarian theories,

13See, e.g., Jesse Dukeminier & James E. Krier, “The Rise of the Perpetual Trust,” 50 UCLA L. Rev. 1303, 1341 (2003) (listing the advantages of a statutory mandate that trust beneficiaries, after the deaths of income beneficiaries known personally by the settlor, be given a special power of appointment over their share of trust assets, along with special power to withdraw principal if needed for their health, education, support, or maintenance).

14See “General Explanations of the Administration’s Fiscal Year 2016 Revenue Proposals” at 200 - 201 (Feb. 2015), available at https://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2016.pdf. The proposal would apply to trusts created after the law’s enactment and to additions to trusts made after that date. It would not apply retroactively to property that has already been contributed to dynasty trusts.
attending when necessary to intramural disagreements within these camps. I do not try to argue that one or another of these accounts of justice or ownership is superior. That would be a much larger undertaking, ill-suited to a journal article. Rather, I try to draw out their implications, to see where they align and where they diverge.

My conclusions are less consoling than I expected. The impulse to control the distant future, ostensibly for the benefit of people with a rapidly receding genetic resemblance to oneself (until cloning is possible and legal), seems overweening or desperate, a pathetic gesture of resistance to human mortality. Yet the case for banning dynasty trusts outright, on any of the major accounts I consider, is at best inconclusive. As the law has long recognized, there are compelling reasons to set aside certain restrictions on the use of trust property or to ignore at least some commands for its

15I argued for a liberal egalitarian theory of justice many years ago. See Eric Rakowski, Equal Justice (1991). Although I would not now defend every conclusion I reached then, that view still seems to me mostly correct.

16There is a lively debate over whether the settlors of irrevocable trusts should be allowed to condition their gifts on a donee’s remaining a member of some religious faith, or marrying someone of that faith, or marrying at all, or divorcing a disfavored in-law. There is less of a debate (except perhaps in some libertarian quarters) over whether decedents may insist that the property they owned at their death be transformed into a grandiose monument to themselves or others. Adam Hirsch recounts the ambition of Ezra Stiles, the third president of Yale College, to bequeath funds for a fifty-foot memorial of his accomplishments, “somewhat in Resemblance of the Ancyran Marble of Augustus Caesar.” Adam J. Hirsch, “Bequests for Purposes: A Unified Theory,” 56 Washington & Lee L. Rev. 33, 76 n.155 (1999) (citing Edmund S. Morgan, The Gentle Puritan 164 (1962)). Stiles abandoned the idea before he died. Catherine McCaig did not. Her will directed her trustees to erect expensive bronze statues of her parents and their nine children, including herself. Unlike the pharaohs, McCaig never got her wish, as the court released her trustees from this duty. The court noted that she (like her brother, who tried to do the same thing) could have put up the statues herself while she was alive. Apparently, however, she could not bear to part with the money until she was sure she no longer would need it. The court found no reason to waste valuable resources on what it considered a memorial to the testator’s vanity. McCaig’s Trustees v. Kirk-Session of the United Free Church, 1915 Sess. Cas. 426 (Scot. 2d Div.). Would choosing the right artist have made a difference?
posthumous destruction.\textsuperscript{17} Outlawing what might seem the folly of lavishing what amount to lottery winnings on remote descendants, however, is much harder to justify.

\textbf{A Consequentialist Analysis of Time Limits}

Any consequentialist appraisal of a legal or social policy depends not just on the controversial correctness of this entire approach to moral evaluation, taken as a complete rather than partial guide to rules or goals, but on a number of decisions that distinguish one consequentialist analysis from others. First, one must determine which values or consequences count. If the approach is utilitarian, then “utility” must be defined, and if a

\textsuperscript{17}A decedent’s wish that her home or goods be torched out of spite for her relatives or from a desire for posthumous notoriety would understandably be dishonored. Opinions are apt to differ, however, about artists’ requests that unfinished work be destroyed, lest in the artists’ view they detract from their legacy. Max Brod, for example, Kafka’s literary executor, refused to heed his friend’s instruction to destroy Kafka’s manuscripts, letters, and note books unread. Whether Kafka would today (or whenever such counterfactual judgments should be made) be pleased by the effect of those materials on his reputation is impossible to say. Other artists knew better than to trust people who valued their creative contributions. Georges Rouault personally burned 315 of his unfinished canvases, believing in his old age that he lacked time and energy to complete them to his satisfaction. For a sensitive discussion of these issues, see Joseph L. Sax, Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures 35-47 (1999). Opinions might also differ about requests to have diaries, letters, or other writings destroyed to protect the confidentiality of an institution or its deliberations, as with Justice Black’s Supreme Court papers, or to save survivors from embarrassment. As Adam Hirsch observes, even if state law allows their destruction, the federal government might impose a tax penalty on the choice, albeit inadvertently. For instance, the executor of the estate of the author Jacqueline Susann destroyed her diary as she requested for the sake of those named in it. Perhaps he was too punctilious in including it in an inventory of her assets at death. The IRS valued the diary at $3.8 million, which resulted in a large increase in the estate tax and therefore a smaller bequest to her desired beneficiaries. See Hirsch, supra note [16] at 76 n.157. Rouault would have made a better tax planner.
person’s utility is thought to depend on her preferences, one needs to specify whether actual preferences or some type of conditional or counterfactual preferences count. If the analysis is consequentialist but not limited to utilitarian considerations, the same questions typically must be asked, but the mix then needs supplementing by values other than the value of satisfying whatever preferences are thought to matter morally. Second, one must specify for how long the relevant preferences continue to figure in the consequentialist analysis. Presumably, if somebody’s preference or desire changes, the abandoned preference or desire no longer bears on personal or aggregate utility. Yet what if a person’s preference does not change but the person ceases to exist? Are the preferences that people had while alive morally significant once they are dead, so that those who come after them act wrongly, all else equal, if they cause those former preferences to be unfulfilled rather than satisfied? Third, in considering a change in legal or social policy, one must decide whether to use people’s current desires or values as constraints or, if one believes that the change in policy is apt to alter desires or values over time, whether to appeal at least in part to the new desires or values one expects to emerge. Fourth, some baseline must be chosen against which to measure a proposed change. Should one imagine the analyzed change occurring against the backdrop of existing institutions and practices? Or, at the other extreme, should one consider the analyzed change as part of package of reforms that would create an ideal world, one in the context of which that change might produce different effects than in our world? Or is there some intermediate benchmark for assessing change?

For purposes of this analysis, I shall make certain assumptions, without defending them at length. First, I shall assume initially that people’s actual preferences or desires are what matter, before relaxing that assumption in considering whether personal virtues
or ideals of character ought to influence state policy. Second, I assume that people’s preferences matter while they are alive, but that a person’s utility may not be increased or decreased by anything that occurs after her death. The prospect of frustrated hopes may cast a shadow over someone’s later years and to that extent be bad for her, but the actual frustration of those hopes after she has died cannot affect the quality of her life any further. Third, I assume that people’s preferences will remain as they are in relevant respects, partly because the mainsprings of human conduct in this area – a selfish concern about how one is remembered, worries about the well-being of one’s kin or friends – have over time been powerfully resilient. Fourth, in judging the wisdom of allowing people to establish trusts of indefinite longevity, I assume that the world remains much as it is. If the utilitarian utopia distributed post-tax wealth (including government services) more evenly than America does today, not counting the influence of bequests or trusts on that distribution, the case against temporal constraints on trusts presumably would be weakened, not strengthened. That a utilitarian utopia would bless even greater inequality than exists today is hard to imagine.

Consequentialist arguments for and against allowing the formation of trusts, and thus for and against setting temporal limits on trusts, overlap with parallel arguments for respecting decedents’ preferences regarding the immediate posthumous distribution of property they owned at their deaths. These arguments are familiar but warrant review nonetheless. ¹⁸

First, the prospect of having one’s wishes honored after death usually provides satisfaction to the potential donor during life. For some, the power to designate beneficiaries might be a burden that would have been avoided if property passed automatically to certain survivors, the state, or some combination of the two. But the vast majority would prefer to have that power.

Conversely, potential donors would likely experience anxiety and frustration if all forms of posthumous control were banned. If inter vivos gifts remained permissible, many might give away their property as they neared what they believed to be the time of their death (or of incompetence that might prevent them from making an effective gift), especially if the alternative to a regime of bequest was one in which the state seized a decedent’s property or the rules of inheritance ran counter to the desires of many decedents. But those who made gifts while alive typically would worry about timing. If they gave most of their possessions to their children and counted on them for support, donors might fear Lear’s fate – and many would suffer it, which would add to the disutility of giving. If inter vivos gifts were prohibited along with bequests, one might expect widespread disobedience or attempts at circumvention that could weaken the political and economic orders, as parents attempted to improve the careers or incomes of their children more energetically than they would in a world where bequests or gifts were permitted. These efforts would detract from parents’ happiness. They also might cause harm to many more through their ramifying effects on political or economic institutions.\(^{19}\)

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\(^{19}\)When the Bolsheviks seized power in Russia in 1918, they abolished inheritance and bequest, declaring that the state becomes the owner of a person’s property upon his death. This law, fitfully enforced, was abandoned as a failure four years later. Nepotism and the abuse of political power or party membership to benefit relatives or friends remained a serious problem for the Soviet state.
Even if these arguments support a right to dispose posthumously of some (not necessarily all) of one’s savings as one chooses, few people have strong preferences regarding the disposition of their property in the very remote future, via a trust that provides income or other support to descendants three or more generations removed. Little donor happiness would be lost, it seems, if this power did not exist. The loss might be all the less because disallowing perpetual trusts makes choosing a postmortem plan easier, thereby removing a potential source of uncertainty or worry. In addition, if the same time restriction applies to all, limiting trusts to a fixed number of years or generations might block one form of competition among donors – a jostling to see who can come closest to conquering time (though the competitors will never know who wins) – that most dislike but otherwise could not escape.

Still, some people will want to distribute their savings across a vast swathe of time, if consequentialist wealth transfer tax laws so allow, possibly pushed by biological urges. The recent surge in dynasty trusts is evidence that a fair number of wealthy

20Sociobiological theories predict that donors will favor their immediate descendants over others, all else equal, because their near relations bear a closer genetic resemblance to them than progeny far removed. However, for those of enormous means, “all else” is far from equal:

[B]ecause the marginal utility of income diminishes, very wealthy transferors should also be expected to wish to spread their gifts out some distance into the future. Once the transferor has settled a million or two on a child, further beneficence is unlikely to result in greater likelihood of survival of her genes. The next million will do more good for her genes if she donates to her grandchildren, even though they are more distantly related. It is likewise with further generations. Therefore, for the very wealthy, it is genetically natural to attempt to provide life sustaining wealth to distant, unborn descendants and other gene carriers.


Whether potential donors actually think this way seems doubtful. I am unaware of
people do care about helping relatives who are centuries removed from them. Although one cannot be sure, it seems reasonable to think that limiting trust duration would on the whole be worse rather than better for potential donors, for the same reason that limiting the size of gifts or bequests would on balance make potential donors worse off.

Second, freedom to make gifts or bequests might foster a stronger sense of responsibility, which in turn might produce two distinct benefits: it might make the potential donor more virtuous, which might matter for some consequentialist views; and it might result indirectly in greater benefits for those to whom that duty is thought to be owed, though perhaps at the cost of some loss of happiness on the part of the donor who considers herself duty-bound. Whether this prediction proves correct in many or most empirical studies showing the prevalence of this type of donative plan. But the absence of anecdotal evidence, such as donors saying that the maximal replication of their genes is for them an important objective, calls this reasoning into question. Indeed, if donors took genetic boosting seriously, presumably they would condition gifts in trust on the reproductive performance of their progeny. Bigger payments might be made to those who had more children, with the largest gifts dependent on having children beyond whatever number a donor expected her descendants to have without additional inducements. Yet I know of no trusts structured in this way.

Mark Ascher writes: “In my time as an estate planner, not one of the clients for whom I worked complained about the duration or the trusts we were helping them to create. Pretty clearly, the wealth were not, at that time, clamoring to create perpetual private trusts.” Ascher, supra note [], at 1157. Suppose that Ascher’s claim is true. (I have every reason to think it is.) People’s preferences today are different, arguably as a result of legal changes that in turn prompted a shift in the market for professional services that further altered peer behavior and with it the desires of potential benefactors. His claim does, however, raise the intriguing question of whether social utility would be higher today and going forward if the bell could be unrung. That possibility – or at any rate the possibility of returning to yesteryear’s status quo of expectations and desires – is one reason consequentialist analyses are so difficult.

T.H. Green defended this view:

[O]n the same principle on which we hold that a man should be allowed to accumulate as he best can for his children, he should have discretion in distributing among his children. He should be allowed to accumulate, because in so doing he at once expresses and
cases is hard to know. Power can promote despotism. As Hegel said, “the recognition of a man’s competence to bequeath his property arbitrarily is much more likely to be an occasion for breach of ethical obligations and for mean exertions and equally mean subservience; and it also provides opportunity and justification for the folly, caprice, and malice of attaching to professed benefactions and gifts vain, tyrannical, and vexatious conditions . . . .”

Even if Hegel exaggerated, allowing people to provide for the material well-being of persons who live centuries or millennia ahead seems unlikely to add perceptibly to whatever wellsprings of personal virtue inhere in the possibility of making choices affecting one’s immediate survivors, whose needs and worthiness one can judge.

Third, the power to determine who takes one’s property might enhance a potential donor’s happiness by prompting others to treat him better in hopes of later reward. Jeremy Bentham seemed to consider this benefit to benefactors an important justification for preserving at least some power of bequest:

By continuing the submission of children beyond the term of minority, the

devels the sense of family responsibility, which naturally breeds a recognition of duties in many other directions. But if the sense of family responsibility is to have free play, the man must have due control over his family, and this he can scarcely have if all his children as a matter of necessity inherit equally, however undutiful or idle or extravagant they may be. For this reason the true theory of property would seem to favour freedom of bequest . . . .

T.H.Green, Lectures on the Principles of Political Obligation 223 (1967).

23G.W.F. Hegel, Philosophy of Right 119 (1952). Hegel believed that the institution of inheritance, with fixed shares for children, would produce more ethically correct behavior on the part of both potential donors and potential donees.
indemnity for paternal cares is increased, and an additional assurance against ingratitude is secured to the father; and though it would be agreeable to think that such precautions are superfluous, yet when we recollect the infirmities of old age, we must be satisfied that it is necessary not to deprive it of this counterpoise of factitious attractions. In the rapid descent of life, every support on which man can lean should be left untouched, and it is well that interest serve as a monitor to duty.24

Whether this pitiful portrait of our golden years supplies a forceful reason for recognizing a power of bequest is uncertain. A potential donor’s gain might well come at the expense of those competing for his largess. The effect on aggregate well-being might be a wash. Perhaps the self-interest of would-be recipients reinforces a natural or culturally ingrained tendency to care for aged relatives in some instances. But one wonders how frequently it succeeds in prompting behavior that genuinely satisfies a potential donor.

At any rate, descendants who will be born long after a benefactor has passed on plainly cannot cushion a decedent’s later years. Hence, this reason for allowing at least some freedom of testation supplies no reason for permitting trusts to endure indefinitely.

Fourth, a person’s relatives or friends may derive satisfaction from following his wishes once he is dead. Somewhat counterintuitively, survivors might actually benefit from a practice of recognizing bequests. Adam Smith observed:

We naturally find a pleasure in remembrance the last words of a friend and in

executing his last injunctions. The solemnity of the occasion deeply impresses the mind. Besides, we enter as it were into his dead body, and conceive what our living souls would feel if they were joined with his body, and how much we would be distressed to see our last injunctions not performed. Such sentiments naturally inclined men to extend property a little farther than a man’s lifetime.\textsuperscript{25}

This justification has a limited reach. It offers no direct reason and only a weak derivative reason for the state or people other than those bound to the decedent by respect or affection to carry out his wishes. And even friends and family might not willingly comply if they strongly disapproved of the decedent’s plans. This seems more a reason for those so inclined to observe hortatory requests than to put the weight of the law behind the institution of testation.

Further, this reason provides no support to the institution of dynasty trusts, which seek to bind people who never knew the decedent, and to do so long after he has been buried. In fact, as time glides forward, this justification loses grip even with respect to people personally acquainted with the dead. As Smith himself soberly noted: “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.”\textsuperscript{26}

Fifth, a venerable, powerful rationale for honoring wills and patterning rules of intestate succession on what decedents generally would prefer is that these institutions

\textsuperscript{25} Adam Smith, Lectures on Jurisprudence 466-67 (1978).

\textsuperscript{26} Id. at 65.
provide an incentive to produce and save while people are alive. Many people work and refrain from consuming some of their earnings at least in part because they wish to help others, it is often claimed. Were they prevented from directing their property to others when they die, they would work less, save less, or both. That in turn would lower current production or society’s capital stock and diminish the utility of other people by slowing economic progress, lowering consumer surplus, or reducing employment. To be sure, if would-be donors worked less at tasks rewarded by the market or spent a larger fraction of their earnings, their lives might prove more satisfying. But utilitarians and other welfare consequentialists generally defer to people’s own judgments about what makes their lives go best, including the balance of work and leisure they choose when their decisions are not constrained, say, by the impossibility of passing on what they have earned.

Still, it is hard to show convincingly that the power to bequeath makes people work harder or save more, at least past the point at which they believe they can adequately provide for a surviving spouse, partner, children, parents, and siblings. People work for a variety of reasons beyond meeting the cost of their anticipated consumption – because work offers satisfaction or distraction, to acquire status or power, from habit or duty – and they save for many of the same reasons. Disentangling the effects of these motivations is nigh impossible. In addition, as many early proponents of reducing intergenerational transfers through a federal estate tax noted, a spur for one generation to labor and accumulate, with whatever beneficial spillovers work and capital create, might simultaneously be a drag on the next generation as it idly clips coupons thanks to its predecessors’ toil.27

27The evidentiary basis of pretty much all commentators’ claims is anecdotal and speculative. It is mostly guesswork. Susan French puts the pros and cons this way: “Having
Although considerations point in both directions, it is hard to believe that permitting people to assign *some* property at their deaths ultimately will diminish productivity or savings. More likely, it will augment both, with generally positive effects. If all of a person’s property were confiscated at death, more people would annuitize their savings and spend more on themselves, to the extent that they could not give away what they earned to others, openly or surreptitiously. They might work less too, possibly to their personal benefit but not to future generations’ good.

Whether allowing people to leave property *in perpetuity* to their descendants has a positive impact on production or savings seems far more questionable. The rich tend to give to their immediate descendants first. They know these beneficiaries personally and are apt to have the tightest bonds with them. Only from any excess they happen to have do they fashion dynasty trusts. It is scarcely credible that many burn the midnight oil or pass up current pleasures specifically to benefit distant descendants they never will meet, though it always is possible that a handful of people would strive to accumulate more for

property tied up in a trust providing a steady stream of economic benefits to a family may provide a solid base from which family members can pursue productive lives without the insecurity and compromises on education and culture that lack of money may bring. Alternatively, it may induce them to arrogance and sloth. If more members of our society had a secure financial base, we might have a healthier, better educated and more creative society. We might end up, however, with a more complacent, boring, and less productive society. Who knows?” Susan F. French, “Perpetuities: Three Essays in Honor of My Father,” 65 Washington L. Rev. 323, 352 (1990).

John Stuart Mill believed that “the hope of founding a family in perpetuity” rarely prompted people to accumulate more because “the incentives in the case of those who have the opportunity of making large fortunes are strong enough without it.” John Stuart Mill, Principles of Political Economy, in II Collected Works of J.S. Mill 223 (J.M. Robson ed.) (1965). Mill also believed that long-lived trusts should be prohibited because “the mischiefs to society of such perpetuities outweigh the value of this incentive to exertion.” Id. at 287-88. Mill seemed to have in mind primarily real property whose use would thereby be restricted, rather than liquid assets that could be bought or sold as trustees deemed appropriate.
this purpose, possibly as yet another way of showing off or being remembered. For this reason, one of the principal arguments in favor of a power of bequest and the opportunity to establish short-term trusts supplies at best a very weak ground for a power to create dynasty trusts.

Sixth, another claim sometimes made in defense of trusts, as opposed to outright bequests, is that donors often know better than donees how to manage their successors’ money or property. On its face, the claim seems dubious. I am unlikely to know as much about what you want as you do. In addition, wills and trust documents tend to be written long before their dispositive provisions take effect, so a gap in time accompanies a chasm in understanding. Yet the claim does have merit in select cases. Some beneficiaries are incapable of managing their affairs wisely, because of age or mental infirmity. And others, though competent to live normal lives in society, know little or nothing about investing or running a business. Naturally, if they received property outright, they might hire investment or management professionals themselves. But some people lack the good sense to pay for professional help when they need it. And with respect to specific items of property, such as a family home or art, a donor might be able to assess which survivor would value a piece of property most.

The claim that donors know best seems unconvincing in a great many cases, though, so far as advancing the happiness of survivors is concerned. With respect to potential beneficiaries two or more generations removed, the contention is particularly weak, unless one thinks that imprudence is endemic and paternalistic restraints on spending are uniformly a good thing, given people’s proclivity to buy too readily.

There are nonetheless two countervailing points that specifically favor long-term trusts, so far as utilitarians are concerned. The first is that they enable very wealthy
people to spread their riches over a larger group of beneficiaries. If the marginal utility of money declines as the amount of money available to a person decreases, perpetual or long-lived trusts might be efficient vehicles for raising descendants’ average welfare and could reduce the negative impact of more concentrated wealth ownership. The second countervailing point is that assets invested by the trustees of a long-lived trust might produce larger collective benefits than a simple bequest. If the alternative to trustee investing is rapid consumption by near-term beneficiaries, the benefits to non-beneficiaries of the trust from a bigger capital stock will be lost. If the alternative to trustee investing is investing by those who otherwise would take title to property directly, the question is whether they would garner a greater return than experts do.

Professional trustees have long been derided for their conservatism, which allegedly results in below-average returns, as well as for the high prices they charge for indifferent investment performance. For many years it was hard to quarrel with the truism that the best way to make a small fortune was to let a bank’s trust department manage a large one. The ethical and legal norms governing trustees have changed, however, and pressures have built, both from prospective benefactors and from within the academic and investment communities, to seek higher long-run returns through more aggressive investment choices. I would be loath to say that the average person would invest more profitably than investment professionals do. Moreover, if those who would have received property under a will rather than through a trust would have turned that property over to professional investors anyway, the existence of long-term trusts probably

29 As Dukeminier and Krier noted: “Multiplication of beneficiaries is not such a bad thing, provided it does not result in burdensome and costly trust administration. It tends to dilute the concentration of wealth – unless family wealth increases as fast as the family itself.” Dukeminier & Krier, supra note [13 - Rise of PT], at 1339.
would be no worse for the economy and all who depend on it than privately invested bequests.\footnote{Lawrence Waggoner, writing as the Reporter for the Restatement (Third) of Property: Wills and Other Donative Transfers, emphasizes a different concern. His worry is that the cost of administering a single trust down through the generations might become enormous as descendants multiply. He points out that if a settlor has two surviving children, if each of those children has two surviving children, and if each of those descendants has two surviving children, with the generational interval set at 25 years, by the 20\textsuperscript{th} generation 450 years out, a settlor will have 1,048,576 descendants, each of whom he calculates is likely to bear a genetic relationship to the settlor of 0.0000953\%. See Restatement (Third) at 554-60. He worries that a trustee will struggle to keep track of all of the relevant births and deaths, which would impose serious risks of the trustee’s failing to fulfill its fiduciary duty and over time result in the conversion of substantial trust assets into professional fees, which he regards as socially wasteful.}

The more serious potential social cost from long-lived trusts is inefficient restrictions on the use or alienability of trust property. Poorly chosen use restrictions, like provisions blocking the sale of trust property, might ensure that trust assets are not used to best advantage, given the desires of future people as expressed through their willingness to pay to fulfill those desires. These restrictions might result in trust beneficiaries being worse off than they otherwise would be. And society might be made much worse off, if settlors were able to tie up property in unproductive or suboptimal uses for decades or centuries. It was largely this fear, particularly as applied to land, that shored up support

\footnote{Waggoner’s mathematical calculations do make one wonder why any sensible person would care enough about that trivial genetic connection four and a half centuries on to want to establish a dynasty trust. Perhaps they justify mandatory disclosures to those mulling over long-lived trusts. Perhaps fee disclosures should be mandated too, as they now are when people invest in mutual funds and other financial products. His specific concerns, however, seem overblown. As Dukeminier and Krier pointed out, the problems of administration and fiduciary strain can be met if the trust is divided regularly at different generational levels, producing a multiplicity of smaller, manageable trusts. See Dukeminier & Krier [13 - UCLA piece at 1339]. Well-drafted dynasty trusts already provide for this type of division. Perhaps in time it will be considered malpractice not to do so. And for those trusts that lack this safety valve, a future court might use its common-law power of equitable deviation to modify the trust’s administrative provisions.}
for the Rule Against Perpetuities.

One might reply that there are ways of dealing with this problem other than through a fixed temporal boundary to trusts. For example, all sovereign governments may take property by eminent domain if a public need arises. This power is used sparingly, however, and cannot be relied upon to put property to better use if that property threatens nobody and does not stand in the way of important public or publicly sanctioned projects. Likewise, zoning laws, environmental regulations, antitrust rules, and other governmental restrictions might from time to time override a settlor’s intentions for trust property, forestalling or ending particularly noxious uses. Yet a problem inevitably will remain, as trusts might consign property to uses that nobody then living – not the trustees, not the government, not the trust beneficiaries, not fellow citizens – would wish, and those inefficient restrictions might not be so irritating as to fall foul of these protective regulations. People often use their property unwisely while they are alive, without fear of collective reprisals or seizure unless their conduct is thought egregious, and it would be difficult to single out property in trust for a different legal regime. Thus, there remains a genuine problem with long-term use restrictions. While owners are alive, they are open to persuasion; they might be swayed by the opinions or pleas of their contemporaries. But irrevocable commands left to trustees can be unyielding, with concomitant inconvenience or annoyance for all. And the longer a trust endures, the greater the risk that use or alienation restrictions will become badly out of step with the preferences and economy of a later time. Limiting the duration of trusts is one across-the-board way to forestall this evil.

However, there are other ways to draw the sting from this objection to perpetual trusts. First, governments may make it a condition of a trust’s unlimited existence that the
trustee or the trust’s beneficiaries be allowed to alienate trust assets if doing so seemed in the best interests of the trust. Almost all American states have conditioned their repeal of the Rule Against Perpetuities on a trust’s having this feature. Second, donors can tackle the problem themselves by giving wide authority to their trustees, perhaps in recognition of their own fallibility as prognosticators. Virtually all professionally drafted trusts – and it is safe to say that almost all long-lived trusts fall into this category – give trustees extremely broad powers to sell, mortgage, exchange, or otherwise dispose of trust assets to profit the trust’s beneficiaries. For just this reason, Lewis Simes, a leading trusts scholar, in the Cooley lectures he delivered over sixty years ago, downplayed the economic dangers of long-term trusts even then:

I believe it is no exaggeration to say that, at the present time, due to changes both in the nature of capital investment and in the law, the proposition that contingent future interests make property unproductive is rarely true in the United States and almost never true in England.\(^{31}\)

Simes’s point is still more obviously true today. The Rule Against Perpetuities was conceived partly to guard against donor restrictions on real property that might hamper later development. In the twenty-first century, when most wealth is held in other forms and trustees typically can sell or encumber real property to best advance the financial interests of trust beneficiaries, its protective role is greatly lessened. What protection it still provides can be assumed by other rules directed more precisely to the evil of

\(^{31}\)Lewis M. Simes, Public Policy and the Dead Hand 40 (1955). The entire quotation was italicized for emphasis in the original.
suspending the power of alienation for too long a time by tying trustee’s hands or by creating so large a class of persons with interests in the property that selling it could become extremely difficult. The traditional justification for the Rule therefore no longer carries weight.

Another old objection to perpetual trusts is that donors may command trustees to accumulate trust profits for a very long time prior to distributing anything, usually with the idea that, long after their deaths, people then alive will gawk at the horde of cash amassed for some eventual beneficiary. They will then recall (but with fondness or admiration?) the eccentric genius who caused this mountain of lucre to form. Trusts can thus be used to dazzle, as well as to benefit a small number of people enormously.

Several responses leap to mind. First, few donors would want to create trusts devoted to long-term accumulation without distribution, so they are likely to be extraordinarily rare if they are permitted. Second, plans regularly go awry; past attempts to build a huge legacy in this way all foundered sooner or later. Third, trust assets are not lost to society. Rather, they represent social savings, which generate wider benefits in terms of economic growth, productivity increases, employment, and innovation, at least if restrictions on alienability are rendered nugatory, in the ways just described. Fourth, if a trust’s assets do pose a genuine peril to political institutions or to competitive markets, those problems can be addressed directly, through laws against anticompetitive practices, political campaign regulation, or taxes on trust distributions. Limiting trust duration as an indirect way of limiting trust size is an unnecessarily overbroad prophylactic. Fifth, if one’s concern is that the trust’s beneficiaries will wield excessive influence or live too

\[32\] For examples and discussion, see id. at 83-109.
well on account of their wealth, that problem can be solved, as many variants of utilitarianism and liberal egalitarianism would, by imposing progressive taxes on gratuitous receipts.

The last, related objection to perpetual trusts stems from a worry about the constraining effects of trusts on subsequent generations. It embodies a fear of tyranny by the dead, a sense that our lives might be ruled and ordered by those who came before in many salient respects, that our wills might have an ever smaller arena in which to flex. Many writers, such as T.H. Green, objected to all trusts on this ground, as he did to the English system of inherited primogeniture in landed estates, because they deprive later generations of control over a portion of the resources the world then has.\(^{33}\) That same worry almost certainly explains why private trusts for noncharitable purposes are not permitted by Continental legal systems.

The nightmare, though, is that an increasingly large share of the world’s goods would come under the sway of temporally unlimited trusts, hemming future people in and leaving an ever smaller corner of the world for them to arrange as they want. They would be left substantially worse off than their forbears in this respect. Imagine that the world’s thousand richest people spent all of their wealth buying up vast tracts of land and choice real urban real estate and placed them in perpetual trusts for use by their descendants. And suppose that their actions started a trend, so that a great many people of moderate means did the same. Can we not imagine that over time many of the living would not be able to find any land or house to call their own, the earth’s surface having become the exclusive domain of the dead? If so, consequentialists might reasonably object because

\[^{33}\text{T.H. Green, Lectures on the Principles of Political Obligation at 223-224.}\]
of the disabling effects of this legal regime on personal development through the stifling of effective control, the possible cementing of class barriers, and a steadily worsening distribution of wealth, which might outweigh any positive spillover effects from the incentives this legal regime would create for hard work and hoarding.

A number of points bear on these concerns, which are common but often not thought through carefully. First, these possible problems are endemic to trusts, as Green observed, not unique to dynasty trusts. Nevertheless, trusts of indefinite duration seem to pose a greater threat to future people’s freedom to shape their world, because we can imagine trusts’ number and the assets they control accumulating over decades or centuries, whereas if trusts had to end within a hundred years, the scenario would alter, as some trust sprang up to take the place of those that dissolved. Of course, a realistic vision of the future would include more than the relentless accumulation of property in trust. It would witness the squandering of trust assets by trustees, the shrinkage of trust corpus through distributions to beneficiaries, sales of property by trusts that would return real estate to the market, and so forth. The steady, glacial growth of the power of the dead through trusts is most likely only a bad dream, even if it cannot be ruled out as a possibility. (The details of the wealth transfer tax regime matter immensely here.)

Second, our concerns seem centered not on resources that can be multiplied by human effort, such as consumer goods, restaurant meals, and designer clothing. Putting these resources in trust cannot stop others from producing more of them to satisfy demand. Nor are our concerns directed to all resources that are finite in quantity, such as valuable antiquities, the possession of which might be highly desirable but which ultimately has little effect on the quality of a person’s life. Our concerns seem concentrated on land, which all of us need to live and which has a limited mass. Not
surprisingly, in England, worries about trusts began as worries about inherited estates in land. Not only is land finite, with some parcels hugely better than others. It also is highly visible, and the animosity that many people feel towards trusts that have choice real estate as their corpus seems akin to their resentment of conspicuous consumption by the wealthy living. It is an escapable reminder of the past’s impinging on our wills.

Still, is there really any reason to be worried? There are many reasons to think not. Trusts have existed for a long time in Britain and the United States, and though their life spans have been limited, the fact is that they control only a minuscule slice of the available assets, including land. Perhaps trusts would come to hold a bigger share if they could endure indefinitely, but even that is not altogether clear – it depends on what investment decisions they make, as well as on government regulatory and tax policies – and, even if they did, it would take an enormously long time under even the most favorable conditions for trusts to be seriously constraining.

In addition, governments have many weapons for forestalling any danger that trusts might pose. Eminent domain, requirements that trustees have a power of sale or alienation if trusts are to last beyond a certain time (as is now typical), laws forbidding fiduciaries from wasting trust assets, and taxes on gratuitous receipts (including the use value of property in trust) can together check the growth of the most worrisome trusts. In the worst case, states committed to certain ideals of equal consideration might even limit the size of parcels that individuals or entities might own, so that nobody could take too much away from the commons.

A further point is that even if long-lived trusts became popular – which at present seems hard to imagine, given most people’s strong preference for benefitting living persons they know rather than future strangers with whom they happen to have a tiny
number of amino acid matches – they could not seriously cramp people’s creativity or control over their surroundings much in any dynamic economy. So long as labor is able to add to the store of goods through innovation and production, people will have resources with which to develop their personal capacities. Perhaps in a static economy with fixed resources and weak redistributive policies, perpetual trusts could straitjacket the living over time, if indeed they caught on. But that is hard to imagine in a growing economy that gives people opportunities to work and save.

Moreover, if justice requires that all members of a new generation be provided with a basic bundle of resources by their parents or society, they would have at least some of the means to personal development notwithstanding the existence of trusts. And some minimum provision of resources and opportunities to achieve a satisfying life is overwhelmingly likely to be required by a consequentialist account of distributive justice no less than by a rights-based egalitarian theory. If some people chose to pass on part of the surplus they created to others through the medium of trusts rather than directly, there seems no reason to complain, once whatever redistributive tax one’s preferred theory of justice demands has been levied on above-average gratuitous receipts. This is especially true if, for reasons already recounted, making trusts a legally available option enhances a community’s overall welfare.

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Where does this analysis leave us? Several utilitarian considerations favor a power not only to bequeath property but to establish trusts during life or at death that last more than a century, perhaps indefinitely: people’s desire to have this power; the satisfaction
they enjoy during life knowing that they have it; the possibility that those few who want
to establish long-running trusts will work harder or save more to accomplish their aim
(though how much more they will work or accumulate is highly uncertain), which
simultaneously and indirectly benefits others; the probability that trustees’ investment
decisions will often be better for future beneficiaries than decisions they would have
made themselves; and the potential for spreading the settlor’s money over a larger group
of people than would receive it if property had to be given away in full at death, which
might boost overall well-being given the declining marginal utility of wealth or income.

If settlors are not permitted to impose obnoxious restrictions on the sale,
encumbering, or use of trust assets, the chief argument on the other side comes down to
the desire of future people to take title outright (though many would themselves like the
power to bequeath, which might temper their desires for outright control). One also
might conjecture that utilitarian considerations would militate against gifts to people in
the remote future, because they are likely to be better off than we and our immediate
successors are; one might think that consumption by those not too far ahead of us might
instead maximize happiness. But this implication may be too hasty. If the alternative is
leaving more property to the next generation, it probably would mean bestowing
additional money on people who already are very well off, since gifts to remote
descendants usually are made only after a settlor’s immediate family members have been
amply provided for.

It is hard to know how to assign the burden of persuasion in this debate. I think it
entirely possible that the arguments in favor of allowing people to make gifts that may
continue in perpetuity outweigh countervailing reasons once alienability and use
restrictions have been eliminated or contained. But one cannot know for sure. Even if
those arguments prevail, though, it does not imply that donors should be allowed to leave all the property they own at their death to others. A wealth transfer tax on donors or a tax on donees, with revenue from the tax being redistributed to people who are poorly off and whose happiness would be much improved by the transfer, might strike the optimal balance between incentives to produce and save and gains from consumption by beneficiaries, whether intended or not. John Stuart Mill, a representative if not always a consistent utilitarian, took the view that some power of bequest would best advance utilitarian ends but that “it may be affirmed that in a majority of instances the good not only of society but of the individuals would be better consulted by bequeathing to them a moderate, than a large provision.” Taxes could be used to approximate this result. If Mill’s conjecture is right, though, neither taxes nor other types of legislation would be appropriate ways of setting a time limits on trusts provided that trustees had wide latitude in managing trust assets.

Finally, a few words about other consequentialist analyses. One could imagine a range of values that might be promoted institutionally beyond a straightforward aggregation of some measure of preference satisfaction. There is no way to review them all. Moreover, it is hard to know how much weight to attach to any particular value

34What sort of donee-based tax would best promote utilitarian ends is hard to say. If the amount of tax depends on somebody’s wealth when the gift becomes effective, then the tax might be unfair to people who saved their earnings, as opposed to those who earned the same amount but who already spent their earnings on themselves. It would, however, be very hard to administer a tax that depended on people’s earnings over an entire lifetime.


36I leave aside the possibility that inheritance, bequest, or trust policy might influence both the number of people who eventually are born and which people in particular are born. These paired problems of population and identity raise familiar challenges for utilitarian theories.
(if one endorses one of them) to arrive at a determinate policy recommendation. An eclectic consequentialism might draw on conceptions of individual virtue and seek to discourage large gifts on the ground that they foster dependency and indolence, or to ban perpetual trusts because they evince an unwonted egotism on the part of donors. Or, in the spirit of theories to be considered later, a consequentialist might favor devices for dispersing wealth widely because her favorite form of consequentialism gives more weight to the welfare of those who have least. However, only a view that considered it not merely unseemly but positively evil to exert any direct control over the remote future seems capable of supplying a decisive reason for limiting trust duration. No doubt that sort of view is possible. Purity or simplicity is not necessarily a virtue in moral theories. But I suspect that few who favor utilitarian norms would embrace it. That brand of consequentialism might pose, through the threat of its extension, too serious a danger to the autonomy of personal preferences as the foundation of individual well-being.

**Libertarian Approaches**

Mansions have many wings, and groupings of ideas about justice and social policy share the same architecture. A diverse assortment of views self-consciously claim the adjective “libertarian.” Several features lend them a family resemblance. Most prominently, they share a fairly robust notion of what sometimes is called self-ownership, which captures the thought that people’s bodies and labor are not collectively owned resources but rather belong to people separately in a way that is conceptually prior to and morally constrains other persons’ liberty to harm them physically or to force them to work for communal ends. They also hold in common the idea that the world’s resources –
certainly its natural resources and in some views resources created by people now dead—belong to people equally, as moral equals, in some sense stronger than one that would give each person an equal vote on how collectively they will be used. Finally, they all aver that efficacious labor yields some entitlement to the products of that labor, though philosophers disagree about the boundaries of that entitlement.

For the purposes of this inquiry, libertarian theories may helpfully be placed in three categories. First come those that hold that just acquisition or ownership entails an unlimited right to dispose of property gratuitously during life or at death, so long as the gift causes no clear social harm, such as the creation of a monopoly. Second, some theories assert that property a person acquires justly through her own labor provides the owner with a right to transfer the property gratuitously, but that property acquired by way of gift does not carry that same right to transfer to a third party. Third, some libertarian theories contend that a property owner has no natural right to make gifts or bequests, even though a society may choose to create and protect that right to secure some collective advantage. Not all libertarian theories fit neatly into these three categories, but they fairly cover the field so far as this essay’s focus on trust duration is concerned.

A. Ownership is Forever

The first set of libertarian theories sees no moral obstacle to the creation of perpetual trusts. Proponents generally believe that people may do as they like with their

37For example, Hillel Steiner’s view is a hybrid of types one and three. Steiner believes that people have a natural right to make direct inter vivos gifts of their property to other living persons, but that they have no right to bequeath property or to place it in trust for the benefit of others. Hillel Steiner, An Essay on Rights 229-82 (1994); Hillel Steiner, “Three Just Taxes,” in Philippe Van Parijs (ed.), Arguing for Basic Income: Ethical Foundation for a Radical Reform 81, 89 (1992).
property, provided that they do not impose serious harms on others or neglect their duties
to a spouse or children.\textsuperscript{38} Advocating for this position, Richard Epstein therefore
concludes that “the traditional rule against perpetuities and the parallel rules limiting
consensual restraints against alienation should be abolished.”\textsuperscript{39} His view is that
“[o]wnership acquired by first possession is and should be of infinite duration”\textsuperscript{40} and that
complete ownership rights may be transferred voluntarily. William Blackstone thought
that simply stating the consequences of this strong conception of ownership was sufficient
to win the day for the opposite view:

\begin{quote}
For, naturally speaking, the instant a man ceases to be, he ceases to have any
dominion: else, if he 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 ages after
him; which would be highly absurd and inconvenient.\textsuperscript{41}
\end{quote}

Perhaps oddly in light of Blackstone’s reasoning, Epstein’s embrace of this conception of

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\textsuperscript{38}John Locke espoused this view, without worrying about inequalities to which gifts and
bequests give rise. Parents are obligated to fulfill their children’s basic needs. Once they have
done so, parents may dispose of property not needed for this purpose as they choose. John
Locke, Two Treatises of Government, (New York: Cambridge University Press, 1960), pp. 244-
246, 347-349, 352-353 [1st Treatise, ch. ix, paras. 88-91; 2nd Treatise, ch. vi, paras. 56-58, 64-
65]. Immanuel Kant took freedom of testation for granted, without considering arguments for its
abolition or limitation. Immanuel Kant, The Metaphysics of Morals (Cambridge: Cambridge

\textsuperscript{39}Richard A. Epstein, “Past and Future: The Temporal Dimension in the Law of

\textsuperscript{40} Id. at 694.

ownership appears grounded in what he considers the superior consequences of the view, rather than in a theory of natural rights. If property rights ceased at death, then either property would return to an unowned state, where it could be grabbed in the way that a first acquirer secures property, or it would pass to other people alive at the time collectively. Both of these possibilities seem to Epstein highly unattractive. As he imagines the consequences of both, they would reduce work effort and investment, promote socially destructive attempts to evade the rule, treat surviving kin unfairly, corrupt state institutions, and create pervasive economic uncertainty that would harm almost everyone.42

But might not unlimited power to shape gifts also be harmful, inasmuch as donors might, for example, create multiple interests in property they leave behind that impedes its sale, preventing it from being used in a socially optimal way? Epstein thinks not. Few settlors would be silly enough to frustrate their own altruistic or dynastic designs, he believes, by placing their beneficiaries in antagonistic relationships. In addition, he thinks, the government’s power of eminent domain can handle any severe inconveniences that crop up. In any case, the thrust of this libertarian position is clear. Because justice does not demand equality of starting points and because property rights endure forever, no legal constraints are warranted on trust duration.

B. Only Labor Generates a Right to Give or Bequeath

Libertarian theories of the second kind at least appear to oppose long-lived trusts, although this implication is not drawn explicitly by all who hold this view and those who

42See id. at 695-96.
do draw that implication may not have compelling reasons for their stance. The essence of this second view is that people have an especially strong claim to property secured through their personal exertion. This claim is sufficiently strong to permit them to give that property away, substituting another person’s consumption of that property for their own consumption. Conversely, people are not as powerfully linked to property they acquired by gift rather than sweat. Their natural right to pass on such property is weak or nonexistent, although in some contexts society might find it expedient to recognize that right in some degree. Stephen Munzer, whose non-libertarian view incorporates (but is not limited to) what he terms the “labor-desert principle,” explains:

[T]he labor-desert principle can support at most a one-time power of gift or bequest. Assume arguendo that the laborer (the original owner) can gratuitously transfer certain property to someone else. It does not follow that the transferee in turn can do so. For the transferee did not work to produce the property . . . .

The idea that other members of the community have a more forceful claim to share in a gift whose source is itself a gift rather than the donor’s labor was a pillar of some early twentieth-century socialist schemes of economic redistribution, which in turn descended

43Stephen R. Munzer, A Theory of Property 396 (1990). In Munzer’s view, property rights should not be determined exclusively by the labor-desert principle. Also relevant are a “principle of utility and efficiency” and a “principle of justice and equality.” See id. at 254. These principles interact in complex ways in Munzer’s theory.

44In the English-speaking world, thanks in part to a timely translation, Eugenio Rignano was probably the most famous spokesman for this position. Eugenio Rignano, The Social Significance of the Inheritance Tax (1924). A good account of Rignano’s wealth transfer tax proposal and similar plans to tax the successive transfer of inherited wealth more heavily than
from ideas current a half century earlier.\textsuperscript{45} Somewhat surprisingly in view of the apparently uncompromising libertarianism of \textit{Anarchy, State, and Utopia},\textsuperscript{46} Robert Nozick came to endorse this view as well.\textsuperscript{47}

Several points bear mentioning. First, this principle is not on its face inimical to perpetual trusts. If a trust’s corpus consists wholly of financial assets and if the trust distributes income or principal to beneficiaries in the form of cash, as is usually the case, then each payment necessarily will be a direct gift from the laborer who acquired the property to a beneficiary. Some gifts will be delayed, but there will be no intermediate donee who was entitled to use or consume the property. The labor-desert principle therefore seems not to frown upon trusts of this sort, however long payments are made after the acquirer has passed on. It seems to speak only to what recipients may do with gifts they receive, requiring them to choose between personal consumption and escheat.

Trusts that permit beneficiaries to use but not consume property might seem different. In fact, though, they are not. Consider the gift of an estate in trust for a line of descendants. Suppose that trust assets will be used to maintain the property, but that


\textsuperscript{46}See Robert Nozick, \textit{Anarchy, State, and Utopia} 150-69 (1974).

beneficiaries cannot sell or mortgage the estate, nor can they decide who will use the house when their turn is done. As with a trust consisting of cash or securities, the settlor of this trust is making a gift over time to a number of people, but in each case the gift is directly to one person or another. It is the gift of the use value of the house for a period of time. The worth of the estate when it is placed into trust equals the present value of using that property for the indefinite future, just as the value of any security placed in trust is equal to the present value of the payment stream it is likely to generate. The only difference between this trust and a trust that pays cash to future beneficiaries is that the consumption made possible by the gift is constrained. Cash can buy a range of goods, but the use of a house is just that, rather than something fungible. So long as a trust does not empower a beneficiary to override a donor’s initial direction and to choose a new beneficiary, perpetual trusts seem not to offend against the labor-desert principle.

Munzer does not speak directly to the existence of long-lived trusts. Like many liberal theorists, he favors a steeply progressive tax on each individual’s aggregate gratuitous receipts. For reasons that are not fully articulated, he also believes that wealthy donors (not just donees who are more lucky than average) should be taxed on the sum of their gifts during life and at death even if they distribute their wealth widely, giving each recipient a modest share. But these policies would not necessarily stop people from

48In addition to being concerned about aggregate gratuitous receipts by each transferee, Munzer has “a subordinate, but not trivial, interest in the gratuitous transfer of very large amounts over a lifetime by any given transferor.” Munzer, A Theory of Property, at 405. Why?

Suppose that a very wealthy woman makes many gifts and bequests to a large number of persons. Then the recipients may pay little or no tax. But it does not follow that nothing of moment or concern has happened. In the pattern of the transferor’s gifts and bequests may lie something affected with a public interest. For example, she may have enriched a wide circle of her extended family and its employees. Or she may have enriched a
establishing perpetual trusts unless the unspecified tax on rich transferors became confiscatory after a point. And that feature would both conflict with the labor-desert principle and lack any apparent libertarian justification. Of course, Munzer does not consider himself a libertarian, and he believes that a number of different principles are relevant when creating property rules. If he falls back on a general consequentialist analysis, however, he seems to have even less reason to ban long-lived trusts than the preceding section’s account of utilitarian thinking, because for Munzer the labor-desert principle appears to have weight independent of and in addition to the weight that a purely consequentialist analysis (Munzer’s principle of “utility and efficiency”) assigns it.

Nozick recognizes that if labor-based property carries with it a right to allow others to consume it, dynasty trusts are possible. Unhappy with that prospect, he suggests limiting the power of donation to recipients who already exist, or perhaps to them plus any unborn beneficiaries who are within a generation of an existing beneficiary. Nozick recognizes that if labor-based property carries with it a right to allow others to consume it, dynasty trusts are possible. Unhappy with that prospect, he suggests limiting the power of donation to recipients who already exist, or perhaps to them plus any unborn beneficiaries who are within a generation of an existing beneficiary.49 Nozick

number of distinct “charitable” entities having the same purpose. Very large concentrations of wealth are not merely funds for consumption but sources of corporate, cultural, and political power. Hence in some cases it may be appropriate to tax the transferor as well as the transferee.

Id. at 405-06. Munzer’s references to something “of moment” and to “something affected with a public interest” seem to me too vague to respond to critically or supportively. But they make one wonder whether Munzer would, for that reason, also place a special tax on large business entities or influential writers or entertainers or otherwise attempt to curb their influence with state power. I would think not. But if economic, cultural, or political power is presumptively a public danger, then the rich are not the only dangerous actors and taxes cannot be the sole check on untoward influence. As to Munzer’s worry about the concentrated power of wealthy private individuals, if that sort of concentration indeed poses a public threat, then it seems sensible to address it when a single person obtains or possesses that power, not later, when she tries to split her possessions and therefore her power into smaller pieces, thereby lessening the peril.

49Nozick, The Examined Life at 32. Nozick’s tentative alternative formulation is intended to allow postponed gifts to unborn children or, if gifts are planned for existing grandchildren, to make provision for any other grandchildren who might be born after a trust takes effect, so that a
says little, however, in defense of this suggestion. He appears to think that a wealthy individual who tries to enrich “his complete lineal descent” is attempting something untoward. He seeks to establish a bond with those related to him in way that Nozick simply asserts need not “be catered to,”\textsuperscript{50} which appears to mean that a society can and should deny it altogether.

It is hard to see how this prescription can be sustained, given other elements of Nozick’s view. If donors may, in Nozick’s opinion permissibly, leave property for children or grandchildren who have not yet been born, then any time limit on donation seems arbitrary. Moreover, if Nozick retreated to the position that a recipient must be alive when a gift is made because only then can a proper “relational bond” be established, he would seem to need a stronger condition – some sort of personal relationship between donor and donee, cemented by personal interaction – to distinguish this case from that of attempted gifts to unborn recipients. Otherwise, it would be permissible to benefit existing unknown persons but not future unknown persons, when there seems no genuine difference in the donor’s (non)bond to the donee. Oddly, given Nozick’s credentials, by implication he appears to say that the state may use force to prevent a deformity of character, a kind of overreaching by donors that, so far as appears from Nozick’s discussion, presents no tangible danger to third parties. This is neither a libertarian position nor part of an attractive consequentialist view.

Second, the normative basis of the labor-desert principle supplies no justification for limiting trust duration. In Nozick’s formulation, the heart of that principle is a quasi-

\textsuperscript{50} Id.

grandparent may treat all grandchildren equally, whenever they happen to be born.
Hegelian idea:

(Property earned or created is an expression of the self and a component of it, so that one’s identity or personality can become embued or extended in such a creation. When the original creator or earner passes something on, a considerable portion of his self participates in and constitutes this act, far more so than when a non-earner passes on something he has received but not created.\textsuperscript{51}

This is a highly romanticized notion of acquisition and donation. Today’s great fortunes typically flow from founders’ ownership of leveraged corporate investments valued at high earnings-multiples by giant capital markets. And gifts of millions of dollars which donors barely know they have can be highly impersonal. They are not like the crib Dad made in his basement workshop from the old cherry tree in the backyard.

Even if one subscribes to Nozick’s idea notwithstanding the absence of any connection between paper wealth and the services that earned it for its owner, though, there seems nothing in this notion that could set any boundary to gifts by an original acquirer. Contrary to Nozick’s claim, moreover, this conclusion extends to subsequent gifts by donees of the original acquirer, so long as the original acquirer licensed the further transfer. The reason is that the labor-desert principle, at least as Nozick sketches it, makes the owner who created it the sovereign of the property he has brought into being, in the sense that he may determine which “portion of his self” to pass on, and in what way. If he may freely substitute another person’s consumption of his self-created

\textsuperscript{51} Id. at 31.
property for his own consumption, as this view assumes he may, why may he not substitute for his consumption that of his initially chosen beneficiary or any person to whom the initially chosen beneficiary ultimately passes on the property? No reason is evident why the original acquirer may not pass on this portion of his self just as he intends – certainly no reason springing from the relationship between exertion and acquisition. And virtually all acquirers who pass on property would intend that their property be consumed by somebody to whom they gave it or who was chosen by somebody to whom they gave it, if the alternative is that the state will take the property and give it to people they do not know. What links the acquirer to the original donee is an intention to benefit, and that intention frequently will pass through the original donee to a second donee designated by the first donee. Thus, there seems nothing in the labor-desert principle itself that might curtail the intergenerational descent of property from the original acquirer.52

The same point applies to Munzer’s equivocal exposition of the labor-desert principle. According to Munzer, “even if [the labor-desert] principle shows why the laborer should have property rights, it does not show why someone else should have them by gratuitous transfer from the laborer.”53 To be sure, it is a bit mysterious how labor, performed against the backdrop of certain conditions that do not include social

52 It is also a gross overgeneralization to suggest, as Nozick does, that gifts of property one has received by way of gift rather than through one’s own labor pass on less of one’s self, whatever exactly that means. Property may gain in significance as it is passed along. Family heirlooms or estates may be cherished all the more over time, becoming more valuable to both donor and donee, as layers of personal or family experience add to their nacre. It is not unusual to treasure and to make oneself more a part of objects that belonged to people one loved than items bought with one’s own paycheck.

53 Munzer, A Theory of Property at 396.
institutions entitling laborers to various powers and immunities, can give rise to any property rights, let alone a bundle that encompasses a right to confer elements of that bundle on other people. But if labor does somehow creates a right to use one’s earnings in a way that does not directly harm other people, then it seems natural to think that the right encompasses a right to give or bequeath. If so, then Munzer’s view seems open to the same objection as Nozick’s. If the laborer-donor can set the terms of his surrendering his property right to another, he should be able to deputize others to act as his agents in making further gifts should they prefer gift-giving to personal consumption. If, for reasons that Munzer does not explain, the principle does not generate a right to confer but only a right to consume, then deciding what to with leftover property depends either on the consequentialist considerations discussed in the preceding section or on the alternative analyses discussed in the next section, all of which have difficulty explaining why perpetual trusts should not be permitted.

Third, if the reason for cutting off donations of labor-created property is that they spawn economic and therefore social or political inequality, then the analysis shifts. A worry about inequality compels the question of what type of equality matters, and it points away from conventional accounts of libertarianism. An answer to that question then leads again either to the consequentialist balancing outlined above or to the libertarian or liberal egalitarian views to be discussed presently.  

Nothing inherent in the

Thus, Vallentyne’s egalitarian commitments push him to conclude that property created by a donor’s labor may be passed on in whole but that recipients have no further right to pass that property to another person:

The rights transferred by gift may include the right to consume the wealth, but they need not include the rights to further transfer that wealth by gift. Indeed, given that an unrestricted right to transfer by gift can lead to wealth dynasties that radically undermine
labor-desert principle prompts this analysis. It must come from the outside, borne along by the belief that values other than giving laborers their due are part of a persuasive overall account of justice in property.

[I’m going to stop here. The draft goes on to consider a third class of libertarian theories and then some liberal egalitarian accounts of justice.]

equality-of-life prospects, it is very doubtful that a plausible conception of self-ownership includes the right to transfer by gift wealth that one gained by brute luck.

Vallentyne, “Self-Ownership and Equality” at 333-34. The direction of Vallentyne’s reasoning – a worry about inequality propelling a modification to a conception of self-ownership – may be questionable, although perhaps nothing turns on whether the worry about inequality alters a conception of self-ownership or whether it limits its scope, as it were, from the outside. What deserves emphasis, here as with Nozick’s theory, is that the worry does not justify the conclusion. If wealth inequality is a problem, the solution is to impose a progressive tax on a recipient’s aggregate gratuitous receipts. The duration of a trust is not the source of the problem. Perpetual trusts may even ameliorate a worry about wealth inequality by breaking the donor’s labor-based property into smaller chunks, which pose smaller threats to equality than direct gifts to descendants.