Book Review

But I Thought the Earth Belonged to the Living

DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW. By Lawrence M. Friedman. Stanford, California: Stanford University Press, 2009. 240 pages. $60.00 (cloth), $22.95 (paper).

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Thomas Jefferson famously wrote that "*the earth belongs . . . to the living*."[1] Sadly, the statement has never been an accurate restatement of the law, either here or in England, as Anglo-American law has long deferred to the Dead Hand. The law of wills allows the dead virtually unfettered discretion in divvying up that which used to belong to them, and probate law generally requires the living to effectuate those desires. The law of trusts allows both the living and the dead to create trusts for the disposition of property over extended periods of time, including long after their death, and the law of fiduciary administration requires the living to manage and enforce these trusts. But Jefferson certainly was not trying to restate the law of the dead. Instead, his statement seems primarily aspirational, encouraging us never to let the control we accord the Dead Hand get completely out of hand. There is also a note of admonition, imploring us never to allow our laws to be used in the establishment of an aristocracy.

For the last several decades, certain trends in the law of the dead have threatened to put us sharply at odds with Jefferson's vision. Though each of these trends has been legislative, the changes they embody are not the product of, nor can they withstand, serious policy analysis. Instead, they are the product of intense and well-placed lobbying by a few particularly motivated special interest groups. As time goes by, and as more and more people reflect on what has happened, these trends may, therefore, eventually fizzle out. Indeed, there is some evidence that this has already begun to occur. But if these trends continue, and if the changes they embody prove enduring, my own view is that we will have broken faith with one of our most sacred

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1. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789) (emphasis added), *in* 3 MEMOIRS, CORRESPONDENCE, AND PRIVATE PAPERS OF THOMAS JEFFERSON 28, 31 (Thomas Jefferson Randolph ed., 1829); *see also* 1 THOMAS PAINE, *Rights of Man*, *in* THE COMPLETE WRITINGS OF THOMAS PAINE 241, 251 (Philip S. Foner ed., 1945).

principles, egalitarianism, and that we may even have unleashed developments that could someday threaten the viability of republican government as we know it.

Seemingly written in response to these trends, a trio of intriguing new books takes up the reach and longevity of the Dead Hand. Each in its own way concludes that our laws now cater, as never before, to the wishes of the dead. In a field that is supposedly as moribund as law ever gets, the publication of three new books on essentially the same topic at essentially the same time strongly suggests that something significant is, indeed, afoot. Interestingly, the books disagree, at least to some extent, as to why the trends have developed. Somewhat surprisingly, they also disagree as to the changes' significance.

This Review takes a close look at one of these books, *Dead Hands: A Social History of Wills, Trusts, and Inheritance Law*,[2] by Professor Lawrence M. Friedman. Its account of the law of the dead is as close to a toe-tapper as I've ever read. It's a deceptively easy read, however, because Professor Friedman's considerable skills as an author often mask the complexity of the underlying concepts. It does, however, stake out several positions as to which there is ample room for debate. In considering these positions, this Review borrows heavily from the other two books: *From Here to Eternity? Property and the Dead Hand*,[3] by Professor Ronald Chester, and *Immortality and the Law: The Rising Power of the American Dead*,[4] by Professor Ray D. Madoff.

Professor Friedman styles *Dead Hands* "A Social History of Wills, Trusts, and Inheritance Law." Yet it often reads less like history and more like an inviting study guide.[5] In the Introduction, Professor Friedman identifies four "leitmotifs." The first is changes in family structure: "It has shifted emphasis from what we might call the *bloodline family* to the *family of affection and dependence*."[6] These changes, he argues, help to account for rather substantial changes in the law of intestate succession, for example.[7] The second is that we live in an "age of elaborate record keeping, computers, data bases, and vibrant bureaucracies."[8] So nonprobate transfers are not so risky, and wills no longer rule the roost. The third is "demographic and

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2. LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW (2009).

3. RONALD CHESTER, FROM HERE TO ETERNITY? PROPERTY AND THE DEAD HAND (2007).

4. RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD (2010).

5. It nicely tracks the usual Estates and Trusts course from intestate succession to the transfer taxes, and it does so with such insight and infectious enthusiasm that I am seriously considering recommending it as optional reading.

6. FRIEDMAN, *supra* note 2, at 11.

7. *Id.* at 12.

8. *Id.* at 13.

cultural changes,"[9] not least of which is that we live a lot longer than our ancestors. These changes affect not only when our heirs will receive their inheritance but also what will be left for them. The fourth is "attitudes in society toward wealth and the wealthy."[10] Though "America was born in revolt against a system of inherited, dynastic wealth," our laws, according to Professor Friedman, now "*favor*[] dynastic wealth."[11]

Let us start with the longest and most elaborate chapter, "Distribution After Death"—basically intestate succession. Professor Friedman promptly identifies two changes of "particular importance."[12] The first is "the merger of rules about real estate and rules about personal property."[13] The second is "the growing share of the estate that goes to a surviving spouse."[14] Both, he asserts, are connected to "the shift from emphasis on the *bloodline* family to the *family of affection and dependence*."[15]

Professor Friedman's primary illustration of the merger of the rules relating to real and personal property is our rejection of primogeniture. Primogeniture ensured that the decedent's lands would pass intact to his oldest male heir. Other rules provided for a somewhat more equitable and far-flung transmission of personal property. The United States rejected primogeniture early on, in favor of partible inheritance, which typically results, after satisfaction of the (possibly greater) claims of the surviving spouse, in an equitable division (variously defined) among *all* of the decedent's children and possibly also *their* issue. So it is true in this and other ways that the general trend has been a homogenization of the way we treat real and personal property at death.[16] Yet merger of the rules relating to real and personal property strikes me as a change only a law professor could love. To me, the vastly more important change is our rejection of primogeniture in favor of a decidedly less dynastic and dramatically more egalitarian method of divvying up property at death. Nor is the switch from primogeniture to partible inheritance related in any significant way to changes in the family, unless one packs that phrase with a whole lot of baggage. In my view, the switch is instead a clear rejection of our English aristocratic roots, in favor of a more egalitarian and republican society.

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9. *Id.*
10. *Id.* at 14.
11. *Id.*
12. *Id.* at 19.
13. *Id.*
14. *Id.*
15. *Id.*
16. *See, e.g.*, UNIF. PROBATE CODE §§ 2-102 to 2-103 (amended 2008), 8 U.L.A. 38, 42 (Supp. 2010) (exemplifying the trend in rules concerning intestate succession). *But see, e.g.*, TEX. PROB. CODE ANN. § 38(b) (West 2010) (prescribing different intestate succession rules for real and personal property); *id.* § 322B (requiring that bequests of personal property abate before devises of real property).

The second of Professor Friedman's particularly important changes, the transformation of the surviving spouse's entitlement, is undeniably true. It is also, in my view, the single most important change in the law of inheritance in centuries. In this respect, Professor Friedman's account seems right on the money. He notes that dower was once a widow's sole protection and that it involved only the decedent's land.[17] Virtually every state, however, has replaced dower with either community property or an elective share, both of which apply to both real and personal property.[18] Simultaneously, Professor Friedman traces the transition of the surviving spouse from being entitled under the law of intestate succession to essentially nothing, as recently as at the turn of the last century,[19] to being the primary—and often exclusive—intestate taker.[20] Again, however, I fail to see how the movement of the surviving spouse to the head of the inheritance pack reflects a change in family structure.[21] The dramatic increase in the surviving spouse's entitlement strikes me as almost entirely attributable to and emblematic of the ever-increasing stature of women in American society.[22]

Professor Friedman is not alone in seeking to establish a link between various changes in inheritance law and changes in the family.[23] No doubt some such changes are best explainable on just such a basis. Adoption, for example, is mostly an American phenomenon; in England, it was essentially unknown.[24] Likewise, although the English no doubt knew a little something

17. FRIEDMAN, *supra* note 2, at 24.

18. RALPH C. BRASHIER, INHERITANCE LAW AND THE EVOLVING FAMILY 12–14 (2004) (noting that only a few states have retained dower, including Arkansas, Kentucky, Michigan, and Ohio).

19. *See, e.g.*, Butler v. Sherwood, 188 N.Y.S. 242, 243–44 (N.Y. App. Div. 1921) (holding that a wife's attempt to transfer both her farm and her personal property to her husband by deed effective upon her death was an invalid testamentary transfer), *aff'd per curiam*, 135 N.E. 957 (N.Y. 1922). Under the New York intestacy statute, because she was survived by a brother, her husband was entitled to at most two thousand dollars and one-half of the personal property. N.Y. DECEDENT EST. LAW §§ 98(3), 100 (Consol. 1909).

20. *See, e.g.*, UNIF. PROBATE CODE § 2-102 (specifying that the surviving spouse takes no less than the first $150,000, as adjusted for inflation through 2008); FRIEDMAN, *supra* note 2, at 180–81 ("The surviving spouse (mostly a she) began our period in a very subordinate position. Now she bestrides the world of intestacy like a colossus.").

21. Professor Friedman himself seems to sense this: "Marriage may be a weaker reed than it used to be, but you could not prove it through the intestacy laws." FRIEDMAN, *supra* note 2, at 25.

22. *See* CHESTER, *supra* note 3, at 75 (attributing increases in spousal protection to the women's rights movement); Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1673–75 (2003) (noting a linkage between increases in spousal protection and the suffrage movement); Anne-Marie Rhodes, *Blood and Behavior*, 36 ACTEC L.J. 143, 168 (2010) (discussing increases in spousal protection in the context of the women's rights movement).

23. *See, e.g.*, Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 6 (2000) (proposing changes in intestacy statutes to parallel changes in American family structures).

24. *See* FRIEDMAN, *supra* note 2, at 22 (noting that English law did not recognize adoptions).

about illegitimacy, we Americans seem to have perfected the practice.[25] Reshaping the law of inheritance to treat our adopted and nonmarital children essentially the same as we treat our other children seems intimately related to changes in how we conceive the family. These changes are also, however, matters of relative detail. In contrast, the biggest changes in the law of inheritance, our rejection of primogeniture and the dramatic increase in the surviving spouse's entitlement, appear to have very different roots.

Dead Hands also contains a lovely chapter on the ordinarily dreary law of wills, including their execution, revocation, and interpretation. Throughout, Professor Friedman carefully documents a decline in formality. He takes pains, however, to distance himself from those who would attribute these changes to "a broad revolt against formalism throughout the legal system":

> [A]t least in *this* field—succession—I hate to pin the source of change on legal theory, or on some vague and general shift in ideology. . . . [A] change in legal culture calls for a specific explanation; and a vague reference to some sort of ideological change is simply not enough. And we must remember that not every branch of law is less formalistic than it used to be. . . . In the law of succession, what drives the motor of anti-formalism is perhaps the gradual but very marked change in the importance, and the role, of the classical will. It now has formidable rivals: the so-called will substitutes.[26]

After a short chapter on will contests, Professor Friedman turns to will substitutes and continues his thought:

> The will once had a virtual monopoly over gifts at death. This is no longer the case. The rise of will substitutes has, in turn, affected the law of wills itself. This is probably a key reason why the law of wills has become less formal and formalistic. After all, now one can draw up a document that looks like a will, sounds like a will, and acts like a will, but isn't a will. This document will not need witnesses, a ceremony, and the whole hocus-pocus surrounding the ordinary will. If so, then it is natural to ask if there is any point in insisting so rigidly on all the formalities and the hocus-pocus.[27]

This is not only a breath of fresh air; it also has the ring of truth. I, too, have long been skeptical of enlisting the law of wills in a frontal assault on "formalism." There are good reasons for demanding at least some level of formalism when *the* most important party to the transaction is *always* unavailable for comment when it comes time to interpret the document. It

25. *See* MADOFF, *supra* note 4, at 61 ("The number of nonmarital children has reached epidemic proportions in the United States; almost 40 percent of all children are born out of wedlock.").

26. FRIEDMAN, *supra* note 2, at 80–81.

27. *Id.* at 100–01.

may also matter that the document in question has almost never been the product of negotiation. Ordinarily, the testator consults with only an attorney, whose primary motivation is to please the client. On other occasions, the testator seems to have consulted no one. Thus, comparisons with contract law, for example, have always struck me as perilous.[28] But Professor Friedman is certainly correct: "[I]n the twentieth century, will substitutes [did grow] like mushrooms."[29] That this was also when hyperformalism in the law of wills began to subside may well be more than a coincidence.

It is in the chapter on trusts that issues relating to the reach and longevity of the Dead Hand begin to surface. According to Professor Friedman, "Legally speaking, over the past century and a half, the dynastic trust has won victory after victory."[30] He points to several developments from the nineteenth century that he says paved the way for dynastic trusts. It is perhaps no accident that each of these developments originated in Massachusetts, where professional trustees first came to prominence. One development was the prudent-person rule governing trust investments.[31] It assumes that most trusts are for the long haul; in any event, it accommodates investment practices appropriate for such trusts. Another was legitimization of so-called spendthrift trusts.[32] These are trusts in which one or more of the beneficiaries' interests are inalienable. In other words, the settlor of a trust, by adding a few more words to the trust document, can effectively render the beneficiaries' interests off-limits to their creditors. Yet another was the so-called *Claflin* doctrine, under which the beneficiaries of a trust cannot by mutual consent terminate the trust ahead of time, even if they are all adult and competent, as long as any material purpose of the settlor remains unfulfilled.[33] The influence of each of these developments quickly spread,

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28. Contracts of adhesion, outliers even in the world of contract law, are a particularly poor analogy. Such contracts may not serve all of the parties' interests equally well, but ordinarily they serve at least one of the parties' interests exceedingly well. In most instances, someone has thought them through *very* carefully, proofread them to distraction, and revised them over a series of transactions, if not over a period of years. Whatever the difficulties that may or may not result from the inequality of bargaining power and the fact that only one of the parties was responsible in any meaningful way for their content, contracts of adhesion generally work. Wills, by contrast, are *supposed to be* custom documents. Often they contain errors, both large and small. In all too many instances, they are simply train wrecks that do not work for *anyone*, except those who have nothing to lose in contesting them and those who litigate for a living.

29. FRIEDMAN, *supra* note 2, at 110.

30. *Id.* at 116.

31. The seminal case was *Harvard College v. Amory*, 26 Mass. (9 Pick.) 446 (1830).

32. The leading Massachusetts case was *Broadway National Bank v. Adams*, 133 Mass. 170 (1882), but the dictum in *Nichols v. Eaton*, 91 U.S. 716, 727 (1875), recognizing a settlor's ability to protect transferred property "from the ills of life" surely had more impact.

33. *See* Claflin v. Claflin, 20 N.E. 454, 455–56 (Mass. 1889) ("The decision . . . rests upon the doctrine that a testator has a right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees fit, and that his intentions ought to be carried out, unless they contravene some positive rule of law, or are against public policy.").

and by the middle of the twentieth century, it permeated the country. The table was thus set, Professor Friedman argues, for the creation of dynastic trusts.

Why these developments occurred is much less clear. Certainly the prudent-person rule gave trustees additional investment flexibility. This may have increased settlors' confidence that the trust assets would be invested appropriately over time. In addition, creating a long-term trust no longer meant taking property off the market indefinitely. Likewise, the ability to insulate the beneficiaries' interests from their creditors and the knowledge that the beneficiaries could not by themselves easily terminate the trust prior to the stated termination date may have steeled settlors in their dynastic intentions. None of these developments, however, is inherently dynastic; each can and far more frequently does apply to trusts of much shorter duration.[34] Nonetheless, based in part on these developments, Professor Friedman asserts that there had already occurred in this country a change in attitude toward wealth generally and toward dynastic wealth in particular. Though we had begun our national existence deeply skeptical of such wealth, we had by the end of the nineteenth century become much more accepting of it.[35] I am not so sure. We had not yet witnessed the flowering of the Progressive Movement. The Sixteenth Amendment and the progressive income tax were still to come. So were both the estate tax and the gift tax. Our national interest in and willingness to enact each of these taxes strongly suggests that we had not yet lost our suspicion of dynastic wealth. It makes sense that these developments would originate in Massachusetts, where trusts, and administering them, first became big business. So it also makes sense that the Massachusetts courts would stake out positions that would accommodate such arrangements. But it does not ring true that there had already been a shift in attitude toward dynastic wealth, in either Massachusetts or the country at large. The rapid spread of these developments may say much less about our collective attitude toward dynastic wealth than about the crucial role that stare decisis played as we pursued our Manifest Destiny across a vast and mostly vacant continent, leaving in our wake dozens of brand-new and semi-autonomous legal systems.[36] When

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34. *See, e.g.*, FRIEDMAN, *supra* note 2, at 114–18 (criticizing the application of the prudent-person rule to short-term trusts).

35. *Id.* at 120–21.

36. Professor Friedman himself, in his classic article, provided a much richer, full-bodied explanation:

> The decisive cases . . . fall into a relatively narrow time-span, beginning about 1880, following in rapid succession for about 25 years, then tapering off . . . . [W]hy did the courts so generally accept the spendthrift trust after 1880? Of course, the very fact that such trusts may have been spreading rapidly was a reason; judges do not normally like to reject patterns of behavior popular among members of their own social class. But deeper causes must have initiated and sustained the trend. The age (1880–1900) was an age of crisis; crisis engendered by the full impact of industrialism, the stresses and

the courts in Oklahoma, for example, took up their first trust cases, a vibrant law of trusts already existed back East. Massachusetts had by then been administering and litigating the affairs of trusts for well over a century. The Massachusetts courts and judges were well respected. Why shouldn't the Oklahoma courts have looked to Massachusetts in fashioning their own law of trusts? In any event, when the first *Restatement of Trusts* appeared in 1935, it incorporated all three developments.[37]

Next comes a chapter entitled, "Control by the Dead and Its Limits: The Rise and Fall of the Rule against Perpetuities." In it, Professor Friedman nicely explains the operation of the rule against perpetuities. Mostly, though, he traces its fall from grace. Until the late 1990s, the rule against perpetuities was a thoroughly accepted, if much maligned, part of the American legal landscape against which those who created trusts had to operate.[38] Brushing

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> strains of a maturing, technical, organized mass economy. In the psychology of the period's social movements, some historians have detected a feeling of uneasiness . . . . Consolidation of economic and social position was a dominant political motive; caste and class were hardening. The industrial "trust," the big union, the farmer's movements, the national grief over the passing of a symbolic frontier: these may suggest a social urge for rule and safety in an economic order increasingly beyond the individual's grasp. The dynastic trust and the spendthrift trust were "conservative" in the sense that they protected estate-entities against social change. That courts could, by their say-so, make secure a long-term "estate" against changing fortunes, may have been particularly pleasing at a time when so many values were called into question.

Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 582–83 (1964) (footnote omitted).

37. *See* 1 RESTATEMENT OF TRUSTS §§ 152–53 (1935) (recognizing spendthrift trusts); *id.* § 227 (setting forth as default law the proposition that trust funds must be invested as a prudent person would); 2 *id.* § 337 (providing rules for terminating trusts by consent, subject to the *Claflin* doctrine). Professor Scott, the Restatement's Reporter, published the first edition of his monumental treatise just four years later. *See* AUSTIN WAKEMAN SCOTT, THE LAW OF TRUSTS (1st ed. 1939). He also served as Reporter for the Second Restatement, which appeared in 1959, and published the second and third editions of his treatise in 1956 and 1967. In short, he presided over the American law of trusts during the middle half of the twentieth century. He spent virtually his entire life in Massachusetts at the Harvard Law School. Naturally, he was a keen observer of the Massachusetts cases, on which he lavished attention in his treatise. He thus played a crucial role in transmitting Massachusetts trust law, not only via the Restatements and the various editions of the treatise, but also via the several generations of well-placed law students whom he taught from 1910 to 1961. *See* Mark L. Ascher, *Scott, Austin Wakeman* (detailing Scott's influence), *in* THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 484, 484–85 (Roger K. Newman ed., 2009).

38. In a couple of states, there had long been no rule against perpetuities, at least as to personal property held in trust. *See* Locklear v. Tucker, 203 P.2d 380, 386 (Idaho 1949) (holding that the common law rule against perpetuities was no longer in force in Idaho); Becker v. Chester, 91 N.W. 87, 100–01 (Wis. 1902) (noting that the rule against perpetuities was abrogated in Wisconsin with respect to personalty). These states had remained, however, well off the beaten path of the trust business. Certainly, there had been no stampedes of settlors seeking to settle perpetual trusts subject to their laws. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS ch. 27, intro. note at 119 (Tentative Draft No. 6, 2010) ("Before 1986, . . . transferors had little desire to take advantage of the absence of a Rule in those states in order to establish perpetual trusts for their descendants from time to time living forever."); Friedman, *supra* note 36, at 550 ("In Wisconsin there are apparently no real barriers to the creation of trusts lasting far longer than the common-law period of perpetuities. Yet settlors in Wisconsin do not seem to want to create private trusts in perpetuity."). I myself recall an acerbic remark uttered, probably in 1977, by

aside thick and pungent layers of arcane detail, one might best describe the function of the rule against perpetuities as establishing an upper limit of approximately ninety years on how long the living must put up with the Dead Hand. Not that that cramped many settlors' style. In my time as an estate planner, not one of the clients for whom I worked complained about the duration of the trusts we were helping them to create. Pretty clearly, the wealthy were *not*, at that time, clamoring to create perpetual private trusts.[39] In the late 1990s, however, various state legislatures began to repeal the rule against perpetuities, either in fact or in practical effect. It is now possible in about half of the states to create private trusts of essentially unlimited duration.[40]

Professor Friedman does a superb job of telling the story of the decline of the rule against perpetuities. He does not attribute the decline to a change in our collective attitude toward wealth generally or toward dynastic wealth in particular. Instead, he says, banks and trust companies declared war on the rule against perpetuities:

> Basically, banks and trust companies lobbied for the change. A tax on generation-skipping transfers (GST) entered the law in 1986 . . . . So, if I leave my estate to my daughter for life, and then to her children after she dies, the GST will tax the transfer when she dies. . . . But [$5 million] of each transfer is exempt. Hence, if I can set up a trust that lasts many, many generations, the [$5 million] gifts can escape tax for as long as the trust itself might last.
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> But how long is that? Only as long as the rule against perpetuities allows. However, if the state abolishes the rule, then a rich man can set up a very long-term trust and take full advantage of this tax loophole. Bankers and trust companies saw this opening and brought their considerable influence to bear on state legislatures, which were happy to oblige.[41]

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my late, great estate planning professor, A. James Casner, also a long-time resident of Massachusetts, to the effect that no one in his right mind would find the prospect of creating a perpetual trust sufficiently attractive to subject it to the laws of either of these states.

39. *See* CHESTER, *supra* note 3, at 22 ("[A] strong case can be made that the relatively new push to extend dead hand control beyond one's immediate circle is a creature not of basic changes in decedents' attitudes, but of the aggressive marketing of estate planning 'packages' by professionals."); Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2470 (2006) ("Although the rise of the perpetual trust might be viewed as evidence of a dynastic impulse, our findings suggest instead that the modern perpetual trust is primarily a creature of the federal transfer taxes."); *supra* note 38.

40. *See* 2 AUSTIN WAKEMAN SCOTT, WILLIAM FRANKLIN FRATCHER & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 9.3.9 n.17 (5th ed. 2006 & Cum. Supp. 2010) (listing twenty-six state statutes that have "actually or effectively repealed" the rule against perpetuities).

41. FRIEDMAN, *supra* note 2, at 131–32. Given the central role of the GST exemption in the war on the rule against perpetuities, Professor Waggoner recently urged Congress to limit the duration of the GST exemption to two generations. Lawrence W. Waggoner, *Congress Should Impose a Two-Generation Limit on the GST Exemption: Here's Why* (Univ. of Mich. Law Sch. Pub.

This, then, is a story *not* about a change in popular attitudes but about the financial-services industry's ability to manipulate state legislatures.[42]

It gets worse. In the ensuing race to the bottom, a second form of competition promptly emerged. Remember spendthrift trusts? In the late nineteenth century, the American courts decided that the settlor, by adding a few words to the governing instrument, could render the trust's beneficial interests inalienable.[43] The settlor could not, however, make his or her own interest(s) inalienable.[44] In other words, settlors could not create trusts for themselves (self-settled trusts) that would allow them to avoid their own creditors. Since the late 1990s, however, the legislatures of a few states have proven themselves willing to go even this extra mile, to allow their financial-services industries to market so-called asset-protection trusts.[45]

This, then, is my biggest criticism of Professor Friedman's book: Where's the outrage? It is certainly true that the rule against perpetuities was, and where it remains in force still is, a crusty old curmudgeon. It is complicated beyond any easy description,[46] and its detractors have never shied away from ridiculing each and every one of its embarrassing little foibles.[47] Virtually everywhere, however, it remained in place until the financial-services industry declared war on it. Why? Because it served a crucial role.[48] There is no good reason why we should permit private trusts

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Law & Legal Theory Working Paper Series, Working Paper No. 205, 2010), *available at* http://ssrn.com/abstract=1640742. Several years ago, the Staff of the Joint Committee on Taxation made basically the same recommendation. JOINT COMM. ON TAXATION, OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES 393 (2005).

42. For a somewhat more nuanced but still abbreviated version of the story, see *infra* text accompanying notes 135–39. For fuller versions, see CHESTER, *supra* note 3, at 22–27; MADOFF, *supra* note 4, at 8, 76–82; Ira Mark Bloom, *The GST Tax Tail Is Killing the Rule Against Perpetuities*, 87 TAX NOTES 569 (2000); Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303 (2003); Schanzenbach & Sitkoff, *supra* note 39; Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005); Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097 (2003).

43. *See supra* text accompanying note 32.

44. 3 SCOTT, FRATCHER & ASCHER, *supra* note 40, § 15.4.

45. For more on asset-protection trusts, see *infra* notes 143–44 and accompanying text.

46. Yet Professor Gray's classic restatement takes only one sentence: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201 (Roland Gray ed., 4th ed. 1942).

47. *See, e.g.*, W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 638 (1938) (noting that teachers of the legal profession love highlighting the difficulty, complexity, and obscurity of the rule against perpetuities); W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 722 (1952) (stating that the rule against perpetuities is "made badly" and a "dangerous instrumentality in the hands of most members of [the legal] profession").

48. *See, e.g.*, CHESTER, *supra* note 3, at 40 ("While the Rule against Perpetuities dealt with the problem of ending longterm trusts only imperfectly, it was certainly better than nothing.").

to live forever. Can you imagine being asked, as a lawyer or a judge, to interpret a trust deed from the year 1011?[49] The changes in custom, style, usage, and even language that inevitably occur over the course of a thousand years would necessarily reduce any interpretation to little more than speculation or, more likely, outright transposition of *our* mores onto the venerable document. Constitutional theory might seem, by comparison, obsessively faithful to the governing instrument. Times have changed so much since 1011 that trying our best to apply the document according to its own terms would be nothing short of quixotic. Such a document would certainly *not* have been executed in the United States; it probably would not even have been executed on what is currently U.S. soil. Its language would necessarily differ starkly from twenty-first century American English. Society itself back then was obviously *very* different, as was the "economy." The legal landscape, including the "tax laws," were too. And what about the beneficiaries? Is there *anyone* reading this Review who can name even *one* ancestor who was alive in 1011?

For centuries, we have allowed charities and charitable trusts to be perpetual, *because they benefit the public*. We sense that a charitable trust is intrinsically more valuable than a private trust. If nothing else, a charitable trust casts its benefits much more widely. We thus tolerate the prospect that we might, on behalf of a charitable trust, someday need to (mis)interpret an ancient document. We also understand that notions of public benefit are necessarily fluid, so we sense little conceptual difficulty when we also realize that a subsequent determination of what benefits the public unavoidably and often consciously reflects, almost to the exclusion of everything else, the current social context. In addition, *cy pres* has long been available to ameliorate and, if need be, to correct for the obsolescence that inevitably ensues when human beings attempt to breathe eternal life into their own pitiful little playthings.

By contrast, private trusts are supposed to be for the exclusive benefit of certain readily identifiable individuals, who are supposed to be identifiable solely by reference to the settlor's intent.[50] Moreover, the trustee is supposed to provide for the beneficiaries and allocate the trust's income and property among them, in certain narrowly defined ways, which again are supposed to

49. Lest the reader accuse me of being unfair or hyperbolic in discussing a trust deed from 1,000 years ago, I would note that 1,000 years is considerably shorter than *forever* and that a number of jurisdictions now permit perpetual private trusts. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS ch. 27, intro. note at 124–25 (Tentative Draft No. 6, 2010) (listing eighteen statutory schemes that allow perpetual trusts). One thousand years is merely the most preposterously piggish period of time that has yet pushed its way into an American perpetuities statute. *See* ALASKA STAT. §§ 34.27.051–.070 (2010); COLO. REV. STAT. ANN. § 15-11-1102.5 (West 2009); UTAH CODE ANN. § 75-2-1203 (2007); WYO. STAT. ANN. § 34-1-139 (2009).

50. 2 SCOTT, FRATCHER & ASCHER, *supra* note 40, § 12.1.

be determined exclusively by reference to the settlor's intent.[51] Yet if we allow private trusts to endure indefinitely, we must also admit that when the time comes to interpret the relevant governing instrument, possibly 1,000 years later, the interpretation will inevitably not be by reference to the settlor's intent but almost entirely by reference to the social context of a brave new world. Doing so seems entirely appropriate in the case of a charitable trust but just plain wrong in the case of a private trust. Professor Friedman and others seem to understand the problem and have suggested importing into the enforcement of private trusts something like the wide-ranging judicial discretion that *cy pres* has long brought to the enforcement of charitable trusts.[52] Yet the law of private trusts does not currently come close,[53] and I would argue that it ought not try. Even the lawyers who help clients create perpetual private trusts seem to understand the problem because they often recommend inclusion at each generation of a special power to appoint the property outright among the settlor's issue.[54] Private trusts are simply different. Precisely because they are so different, they should not be perpetual.

Allowing private trusts to be perpetual is loony for yet another reason. I have never understood why we allow healthy, adult children an almost unlimited right to inherit their parents' property.[55] In most cases, however, children at least *knew* their parents. Maybe, even, in a miniscule number of instances, they contributed to a parent's acquisition of property. Grandchildren, too, generally knew their grandparents to at least *some* extent. But what about great-grandchildren? And great-great grandchildren? And great-great-great grandchildren? And great-great-great-great grandchildren? If at this point you think I'm beating a dead horse, think again. Forever is a long time. Yet at some point, not far beyond grandchildren, the beneficiaries of a perpetual private trust will have no claim that sounds meaningfully in affinity, contribution, or even acquaintance, on which to anchor a claim to an interest in what used to be the settlor's property.[56] They will be nothing

51. *See generally* 4 SCOTT, FRATCHER & ASCHER, *supra* note 40, chs. 19, 20 (explaining the investment of trust funds and the concepts of principal and income, respectively).

52. FRIEDMAN, *supra* note 2, at 121–22, 136; *see also* CHESTER, *supra* note 3, at 47–53.

53. *See, e.g.*, UNIF. TRUST CODE § 412 (2006) (giving courts the power to modify the administrative or dispositive provisions of a trust due to unanticipated circumstances or inability to administer the trust effectively); *see also* CHESTER, *supra* note 3, at 47–53 (recounting various reform efforts regarding the modification of long-term trusts).

54. *See* Susan F. French, *Perpetual Trusts, Conservation Servitudes, and the Problem of the Future*, 27 CARDOZO L. REV. 2523, 2525 & n.8 (2006) (explaining a tax advantage under the Internal Revenue Code for conservation servitudes "'granted in perpetuity'").

55. *See* Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 74 (1990) (proposing strict limitations on disposition of wealth to healthy, adult children).

56. *See* CHESTER, *supra* note 3, at 4 ("Most decedents really have no chance to know generations more remote than that of their grandchildren. Thus the decedent could not really care in any human way about these hypothetical future descendants.").

more than the winners of a genetic lottery run amuck. That someone might be entitled to receive periodic checks from a trustee merely because a wealthy great-great-great-great grandparent lived in a state that permitted perpetual private trusts strikes me as deeply offensive to our shared egalitarian ideals.[57] Permitting perpetual private trusts also strikes me as utterly devoid of any significant offsetting justification, such as providing the settlor with meaningful additional incentives to earn and save or increasing fidelity to the settlor's wishes, for reasons that should by now be apparent.

Another reason not to permit perpetual private trusts is that, in the final analysis, the only real beneficiaries will be the trustees and the lawyers.[58] Over time, the number of trust beneficiaries will increase geometrically. Soon there will be so many beneficiaries that trust administration in anything like the usual way will become prohibitively expensive and eventually impossible. One estimate suggests that the average settlor might have 450 descendants 150 years after creating the trust; 7,000 descendants after 250 years; 114,500 descendants after 350 years; and 1.8 million descendants after 450 years.[59] Thus, the "demographics of descent put the perpetual or multiple-centuries trust on a collision course with core principles of trust administration."[60] To avoid liability for distributing trust assets to one who is not a trust beneficiary, the trustee would at some point have to undertake expensive and repetitive inquiries just to keep track of the beneficiaries.[61] For centuries, the rule against perpetuities has relieved trustees of most such burdens. In the case of a perpetual private trust, however, once the trustee has identified all of the beneficiaries, the fun has only just begun. Precisely how does one administer a trust that has thousands—or millions—of beneficiaries? It is fundamental that the trustee must act in accordance with the duty of impartiality. Not only must the trustee's actions be impartial—the trustee must, as appropriate, consult with, and take into account the

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57. *See* MADOFF, *supra* note 4, at 8 ("The result [of dynasty trusts] will be the creation of new societal divisions between those who are beneficiaries of these tax-free, judgment-proof, long-term trusts, and the rest of society.").

58. Is it any wonder that elements of the financial-services industry lobbied so hard for the necessary legislation?

59. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS ch. 27, intro. note at 120 (Tentative Draft No. 6, 2010).

60. *Id.*

61. To avoid similar difficulties, the trend in the law of intestate succession has been to cut out "laughing heirs," usually defined as those beyond grandparents and their issue. *See, e.g.*, UNIF. PROBATE CODE §§ 2-102 to 2-103 (amended 2008), 8 U.L.A. 38, 42 (Supp. 2010) (providing for intestate succession only to descendants of the decedent's grandparents or closer kin). If none of a decedent's heirs qualifies, the property that would have passed by intestate succession escheats to the state. *Id.* § 2-105. The "penalty," thus, is forfeiture. Refusing to allow private trusts to endure for more than a couple of generations imposes no such penalty. The family merely gains unrestricted access to the property sooner than the settlor may have wished.

significantly differing interests of, each of the beneficiaries.[62] At some point, all too often after the trustees and the lawyers have pretty much picked the trust's bones clean, the court will have no choice but to do that which the rule against perpetuities has long done—put the trust out of its (and its beneficiaries') misery.[63]

Nor is legislation authorizing spendthrift protection for self-settled trusts a positive development. It's not at all clear why we allow spendthrift trusts to stand between trust beneficiaries and their creditors. Our departure in this respect from English law[64] outraged Professor Gray, for example.[65] Why we would also allow the settlor to retain an interest in a trust while denying the settlor's own creditors access to the retained beneficial interest is even harder to fathom.[66] Certainly the possibility that such a settlor can thereby almost literally have his or her cake and eat it too[67] only sharpens the perception that the law favors the haves, particularly those who have the means to pay for the finest legal representation, over everyone else.[68]

As Professor Friedman shows, the changes that have resulted in the decline of the rule against perpetuities and the advent of the self-settled spendthrift trust do not reflect considered judgments about good policy.[69] Why Professor Friedman is so hesitant to criticize these developments is

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62. *See* UNIF. TRUST CODE § 803, 7C U.L.A. 600 (2000) (setting forth the trustee's duty of impartiality in "investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests"); RESTATEMENT (THIRD) OF TRUSTS § 79 & cmt. d (2007) (requiring the trustee's impartiality in investing, protecting, and managing the trust estate and in consulting with the trust beneficiaries).

63. *See* William J. Turnier & Jeffery L. Harrison, *A Malthusian Analysis of the So-Called Dynasty Trust*, 28 VA. TAX REV. 779, 779 (2009) ("Administrative and tax costs are likely to reduce the yield on such trusts to a level where inflation, rising expectations, and an ever growing band of beneficiaries are typically assured to outpace the ability of the trust to deliver the benefits anticipated by trust settlors."). For a different take, see Eric Rakowski, *The Future Reach of the Disembodied Will*, 4 POL. PHIL. & ECON. 91, 123 (2005) (predicting that a perpetual private trust will be administered "more like a professionally managed pension account" or a "garden-variety mutual fund").

64. *See* FRIEDMAN, *supra* note 2, at 122 ("[T]he spendthrift trust doctrine has no real counterpart in England.").

65. *See* JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY, at iii–xiv (2d ed. 1895) (lamenting the rise of the spendthrift trust in the United States).

66. No doubt many physicians yearn for relief from the threat of malpractice liability. Some of the marketing for asset-protection trusts seems clearly aimed at them. *See, e.g.*, ALASKA TRUST COMPANY, http://www.alaskatrust.com/ (featuring a photo of a physician in the center of the home page screen). Might the rise of the asset-protection trust be the revenge of the trust lawyers on the tort lawyers?

67. *See* Elena Marty-Nelson, *Offshore Asset Protection Trusts: Having Your Cake and Eating It Too*, 47 RUTGERS L. REV. 11 (1994).

68. For more on self-settled spendthrift trusts, see *infra* notes 143–44 and accompanying text.

69. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS ch. 27, intro. note at 126 (Tentative Draft No. 6, 2010) ("The policy issues . . . have not been seriously discussed in the legislatures."); MADOFF, *supra* note 4, at 6 (contending that, while greater and greater rights are granted to the dead, these changes occur "with little attention paid to the costs imposed on the living").

unclear. It is not that he is uncomfortable sharing his opinions. He complains that the law of inheritance "is surely still too rigid," that it still requires "too many formalities," and that it is "still too bureaucratic and complex."[70] He complains bitterly about McCarthyism.[71] And he loves to jab conservatives and Republicans.[72] But when it comes to evaluating the war on the rule against perpetuities or the campaign for self-settled spendthrift trusts, he is missing in action.

In fairness, it may be that Professor Friedman thinks that neither the decline of the rule against perpetuities nor the advent of the self-settled spendthrift trust is all that bad—or all that big a deal. Toward the end of his discussion of the rule against perpetuities, for example, he spends a fair amount of time arguing that perpetual accumulation trusts probably won't "suck into their maws a big share of the country's wealth."[73] I agree. The courts have always been leery of long-term accumulation trusts.[74] Moreover, only the truly nutty are interested in consigning their assets indefinitely to accumulation trusts. Normal folk want their assets to continue benefitting themselves and their families. It is the perpetual trust for the benefit of the settlor's family or the self-settled spendthrift trust that Professor Friedman should have worried more about. Unlike perpetual accumulation trusts, these are devices that are now reportedly being created in fairly large numbers.[75]

More generally, Professor Friedman asserts, "Even without perpetual trusts, the very rich have a tendency to *stay* rich. . . . [T]he Vanderbilts and the Astors and the Duponts seem on the whole to be doing quite well, without perpetual trusts. . . . I doubt that perpetual trusts will make things much worse, or worse at all."[76] Yet as Professor Friedman admits, not all of the "great" families continue to command anything like their old economic empires. We have all heard the old saying: "Shirtsleeves to shirtsleeves in

70. FRIEDMAN, *supra* note 2, at 32, 42–44, 179.

71. *See id.* at 151–52 (mentioning congressional investigations into tax-exempt charitable organizations based on unfounded suspicions of Communist ties).

72. *See, e.g.*, *id.* at 53 ("Conservatives wring their hands and worry about the decline of the West, and the decay of traditional values, and so on."); *id.* at 152 ("The right wing was especially suspicious of the social sciences."); *id.* at 169 ("This fact has not escaped the beady eyes of conservatives."); *id.* at 177 ("The Republican party beat the drums . . . .").

73. *Id.* at 136–39.

74. *See, e.g.*, Thellusson v. Woodford, (1798) 32 Eng. Rep. 1030 (H.L.) 1030–33, 1036–38, 1044–45 (appeal taken from Eng.) (construing a will to avoid impermissible accumulation); Trusts of Holdeen, 403 A.2d 978, 978–81 (Pa. 1979) (invalidating provisions for accumulation of trust income for 500 to 1,000 years).

75. *See* MADOFF, *supra* note 4, at 82 ("[D]ynasty trusts have become part of a standard estate plan for wealthy individuals."). For similar observations, see CHESTER, *supra* note 3, at 24–27; Dukeminier & Krier, *supra* note 42, at 1316; Sitkoff & Schanzenbach, *supra* note 42, at 410–11; Ray D. Madoff, *America Builds an Aristocracy*, N.Y. TIMES, July 12, 2010, at A19.

76. FRIEDMAN, *supra* note 2, at 135; *see also* Rakowski, *supra* note 63, at 122 ("Allowing trusts to continue to be formed, now without limits on their duration, seems unlikely to make matters worse . . . .").

three generations." And even if some of the "great" families do remain quite well-off, notwithstanding our meager efforts at reining in their wealth, that fact hardly argues for making it easier still for them to realize their dynastic ambitions. It may well be that the very rich simply are different, i.e., that it is exceedingly difficult to stifle their dynastic efforts. This, too, is hardly an argument in favor of encouraging those who aren't *very* rich to try to keep up with the Vanderbilts.[77] It is one thing to admit that the law may not always have had its desired effect on the very rich; it is quite another to sit idly by while the law openly signals approval of dynastic behavior and encourages it in far broader segments of society.

Others, like Professor Madoff, openly worry about the dangers of perpetual private trusts:

> [A]lthough these trusts operate largely outside the public view, like spores in a horror movie, they are posed to fundamentally transform the face of the United States by creating a new aristocracy made up of individuals who have access to large amounts of untaxed wealth to meet their every need and desire while being immune from claims of creditors.[78]

She notes that exploitation of the GST exemption, currently $5 million ($10 million per couple), is only the tip of the iceberg.[79] Typical GST planning calls for "leveraging" the GST exemption: The settlor funds the GST-exempt trust (i.e., a dynasty trust) with assets expected to appreciate dramatically over time. One way to do this is to fund the trust with a deeply discounted minority interest in a family business. Even if the settlor uses cash, the trustee may purchase insurance on the life of the settlor (or someone else). Upon the death of the insured, the trust ordinarily ends up with vastly more than the premiums paid, at no additional income tax or transfer tax cost. Other methods of leveraging include using trust assets as start-up capital for a business enterprise or to purchase, at a substantial discount, a minority interest in a family business. Leveraging thus enables a family to commit to the dynastic enterprise vastly more than the amount of the current GST exemption. Moreover, because the magic of the GST exemption is strongest

77. Even today, the GST exemption is "only" $5 million. I.R.C. §§ 2631(c), 2010(c) (West 2010). These days, a fair number of people can afford to create irrevocable trusts of up to $5 million to exploit an overly generous tax loophole. Very few such folks, however, bear any meaningful resemblance to the Vanderbilts. Likewise, one does not need $5 million to play these games. Almost all estate planners eagerly ply their trades for clients worth considerably less. Moreover, as word-processing skills and familiarity with the Internet increase, more and more people will create their own governing instruments online. Soon, perpetual private trusts of all shapes and sizes will begin to surface. It stands to reason that changes in the law are much more likely to affect the behavior of those who are nearer the margin of the planning envelope than that of the Vanderbilts. One of the most insidious aspects of these changes may be that they encourage people at any number of economic levels to aspire to dynastic behavior.

78. MADOFF, *supra* note 4, at 76.

79. *Id.* at 82–85.

when the property remains in trust indefinitely, a family with dynastic objectives can amplify the exemption's effect by making as few distributions as possible. Say that a beneficiary needs a principal residence or wants a vacation home. Why shouldn't the trustee purchase, own, and maintain the dwelling, allowing the beneficiary to live there rent free? The trust would thus retain the exempt property, and as the dwelling appreciated, so would the trust. Alternatively, if a beneficiary wanted to start a business, might not the trustee provide the funding and retain most, if not all, of the equity? Again, the trust would retain the exempt assets, and if the business prospered, the dynasty would too.

Professor Chester, as well, is clear that good policy does not include perpetual private trusts:

> Locking up trust funds in perpetuity through generations of a family smacks of aristocracy. . . . Although experts differ . . . it is hard to deny that, at least symbolically, the widespread allowance of such trusts by the legal system seems antidemocratic. My own conclusion is that the Rule against Perpetuities has for centuries struck a reasonable balance between the interests of wealthy families and of society as a whole and thus should be retained in some form.[80]

In addition, dynasty trusts may not be good for their beneficiaries.[81] Even where the rule against perpetuities still limits the duration of private trusts, many thoughtful settlors impose substantial limitations on what they make available to their beneficiaries. Some impose age limitations, requiring their beneficiaries to be twenty-five or thirty-five years old, or older, before receiving their shares. Others impose conditions requiring their beneficiaries to get a college education, lead a life of sobriety, marry the right sort of spouse, or adhere to the right religion, in order to receive, or to continue receiving, their shares. Yet others consciously limit that which their beneficiaries can receive, either by dissipating it prior to death or by leaving it to others, such as charity or a surviving spouse. Why we would encourage the creation of dynasty trusts designed to blindly benefit endless generations, when so many people believe that doing so is not even in their own children's best interest, is not clear.

In the penultimate topical chapter, Professor Friedman takes up charitable gifts and foundations, which we have long permitted to be perpetual. He finds that they, too, pose little threat to an egalitarian society. For a number of reasons, he argues, gifts to charity involve substantially less

80. CHESTER, *supra* note 3, at 116; *see also* Rakowski, *supra* note 63, at 122 ("I confess to a lingering feeling that long-lived trusts are symbolically pernicious . . . .").

81. *See* MADOFF, *supra* note 4, at 8, 82 ("Many wealthy people, including Andrew Carnegie and Warren Buffet[t], believe that it is not in their children's best interest for them to be given so much wealth that they don't need to work."); Ascher, *supra* note 55, at 99 (collecting similar viewpoints).

Dead Hand control than one might otherwise suppose.[82] First, the best-advised settlors usually articulate their charitable purposes in exceedingly broad terms.[83] Second, *cy pres* has long allowed courts to reformulate a charitable trust's charitable purpose when the original purpose becomes illegal, impossible, impracticable, or now, wasteful.[84] Third, although the settlor's friends and family are ordinarily in charge at the beginning, others, much less familiar with the settlor and much less sympathetic to his or her wishes, inevitably replace them.[85] Professor Friedman also seems to conclude that a vast network of charitable foundations and their staggering wealth are a nice counterbalance to governmental and corporate power.[86]

Professor Madoff takes a substantially dimmer view of perpetual charitable trusts. First, she says, it is all too easy to overestimate the benefit they confer over time.[87] One might think that a never-ending stream of payments would inevitably amount to a *huge* sum. Given the present value of money, however, a dollar now is worth significantly more than a dollar later. In fact, a buck consigned to a perpetual charitable trust is incapable of *ever* producing the same bang as a buck given outright. Second, the perpetual charitable trust "is founded on an assumption that people can make intelligent decisions about the use of resources in the distant future. . . . Does it really make sense for current policy to be dictated by plans established by someone living in the year 200?"[88] Third, the availability of perpetual charitable trusts "encourages saving for tomorrow (and the next century and next millennium) instead of spending for today. . . . [I]n the pursuit of perpetuity, fewer resources are being devoted to these pressing issues."[89] Fourth, "[t]he biggest beneficiaries are the trustees, who are paid large trustee salaries, and the supporting institutions, such as banks and other financial services companies, who are paid fees for managing this accumulating wealth."[90] Fifth, the tax incentives for charitable giving, be it for purposes of the income tax, the estate tax, or the gift tax, take the form of a deduction.[91] Thus, the value of the incentive increases with the donor's wealth. Indeed, in the case of the estate tax and the gift tax, it is only the truly wealthy who

82. FRIEDMAN, *supra* note 2, at 169.

83. *See id.* at 142, 155, 160 (noting that large foundations typically have sweeping mandates).

84. *Id.* at 153.

85. *Id.* at 168–69.

86. *Id.*

87. MADOFF, *supra* note 4, at 105–06.

88. *Id.* at 106–07.

89. *Id.* at 107.

90. *Id.*

91. *Id.* at 109–12; *see also* I.R.C. §§ 170, 2055, 2522 (West 2010) (granting deductions for income, estate, and gift tax purposes).

receive any incentive at all.[92] This suggests that the sorts of charities that receive the greatest tax subsidies may well differ dramatically from those that a broader slice of society might have chosen.[93] Fact seems to bear out this hypothesis given the propensity of the wealthy to support causes like art museums, opera houses, symphonies, Ivy League universities, a handful of elite private schools, and NPR. Moreover, the quantitatively unlimited nature of the deduction[94] makes the estate tax, quite literally, a "voluntary tax."[95] That Congress would allow the wealthy—no matter how wealthy—thus to deny the government any share of their wealth, simply by leaving it to charities of their own choosing, seems remarkable, in and of itself. Even worse,

> Charitable dollars do not fund necessary public expenditures, such as the costs of national defense or Social Security. In addition, private dollars cannot create programs that have a truly transformative effect on society, such as the GI Bill and investment in public education. Moreover, decisions about how charitable dollars are spent are made by the wealthy individual instead of through the political process. In this way, reliance on private charity as opposed to public tax revenues further undermines the strength of the democratic form of government.[96]

It is hard to find fault with any of Professor Madoff's criticisms. On the other hand, each of Professor Friedman's observations also seems entirely accurate.

Professor Madoff is quite right when she notes that the legal status of the charitable trust has not always been secure in this country.[97] Since the dawn of the twentieth century, however, it has been.[98] Moreover, from their very beginnings, the income tax, the estate tax, and the gift tax have provided generous incentives for charitable giving, both outright and in trust. For better or for worse, then, charities and charitable trusts are so firmly embedded in both our law and our society that it is almost impossible to envision life without them. Few would deny that, taken together, charities and charitable trusts do an immense amount of good. In addition, the Dead Hand

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92. *See id.* § 2010(c)(3) (West 2010) (setting forth, for estate tax purposes, a basic exclusion amount of $5 million); *id.* § 2505(a)(1) (fixing gift tax unified credit at the same level as estate tax unified credit).

93. MADOFF, *supra* note 4, at 111–12.

94. I.R.C. § 2055.

95. *See* MADOFF, *supra* note 4, at 109 (noting that the unlimited charitable deduction allows complete avoidance of the estate tax). For the source of the label in the text, see George Cooper, *A Voluntary Tax? New Perspectives on Sophisticated Estate Tax Avoidance*, 77 COLUM. L. REV. 161, 221 (1977).

96. MADOFF, *supra* note 4, at 70.

97. *See id.* at 91–95.

98. *See, e.g.*, 5 SCOTT, FRATCHER & ASCHER, *supra* note 40, § 37.1.3 (chronicling the gradual acceptance of charitable trusts by American courts and legislatures).

control inherent in charitable trusts pales in comparison with that inherent in perpetual private trusts. We the living should, therefore, strongly prefer charitable to private Dead Hand control. In that light, the unlimited charitable deduction makes perfect sense. To be sure, allowing the wealthy to opt out of the transfer tax system by devoting their wealth to charity substantially limits the government's ability to raise revenue. But raising revenue is only one of the objectives of the transfer taxes. Another is to break up concentrated wealth, and the transfer taxes accomplish this objective every time they divert wealth to a charitable trust. For all of these reasons, my own gaze is on the more recent and less securely embedded extensions of the Dead Hand, such as the decline of the rule against perpetuities and the advent of the self-settled spendthrift trust. These are developments that are hard to describe as positive for anyone other than the financial-services industry and those with dynastic aspirations.

Professor Friedman's final topical chapter deals with taxes. It is the shortest and least thoughtful. It does little more than note that "death taxes" have come down dramatically in the last few years. It does, however, begin the drum beat, which continues in the concluding chapter, that our collective attitude toward wealth, and toward dynastic wealth in particular, is not what it used to be.[99] As I have already indicated, I do not believe that the war on the rule against perpetuities or the campaign for self-settled spendthrift trusts says anything about our collective attitude toward wealth. Nor am I convinced that the recent decline in the death taxes proves that we are any less hostile to dynastic wealth than we used to be. That Californians in the 1980s voted to repeal a death tax that only a tiny portion of them could ever even have hoped to pay[100] surely says considerably more about our collective resentment of taxes and our widely shared suspicions that both government and government spending are thoroughly out of control[101] than about our attitude toward wealth. I would predict that, when and if we ever pull our heads out of the sand and begin to make the tough choices that the Greeks, the French, the British, and the Irish now face, we as a country will promptly decide, once again, to soak the rich—and *especially* their heirs. Thus, it strikes me that news of the demise of the transfer taxes may be exaggerated. Under the terms of the very Act that "repealed the death tax," the federal estate tax was always scheduled to reappear in 2011.[102] In fact, Congress recently struck

99. FRIEDMAN, *supra* note 2, at 175.

100. *Id.* at 176.

101. How else can we interpret the staggering Republican gains in the November 2010 election? It would be beyond foolish to conclude that those who voted Republican cherish chronic deficits well in excess of $1 trillion. Yet if the candidates for whom they voted stood for anything, surely it was for "no new taxes." It is, therefore, hard to avoid the conclusion that a great many such voters voted against Big Government and government spending.

102. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 901, 115 Stat. 38, 150.

from the books the statutory language that had implemented the silly one-year repeal.[103]

As to taxes, others have been considerably more thoughtful. Professor Chester, for example, makes a number of important points about the role of an estate tax in limiting the Dead Hand. Some are obvious, but one in particular bears repeating: "[T]he battle over 'death taxes' is in reality a battle over the amount of power and control a decedent can still exercise after death. To the extent we weaken the taxation of wealth at death, we weaken any notion that '[the] earth belongs . . . to the living.'"[104] Plainly, anything that weakens the estate tax strengthens Dead Hand control. Yet over the last three decades, the federal "death tax" has been under siege. Professor Madoff, too, does not content herself with recounting its decline. "By failing to tax transfers of wealth," we give up "an opportunity to raise revenue that could be used for a number of purposes."[105] "Failing to tax transfers of wealth at death," she continues, "promotes and nurtures an aristocratic class—individuals with enormous amounts of wealth and power achieved not because of their talents or effort but solely because of the luck of their birth."[106] We should care, she says, because of the disproportionate power of the wealthy in government evidenced, for example, by the number of multimillionaires we elect to Congress.[107] "[W]hen there are gross disparities in wealth, there is more likely to be a mismatch between the interests and perspectives of those who govern and those who are governed."[108]

The opening shot in the Reagan Revolution's war on the death tax involved the marital deduction, of all things. In the Economic Recovery Tax Act of 1981,[109] the marital deduction, which had previously been limited to 50% of "adjusted gross estate,"[110] became quantitatively unlimited.[111] It also became *much* cheaper. Previously, it had been available only for transfers that conferred on the donee spouse power to control the ultimate disposition of the transferred assets.[112] After ERTA, however, the marital deduction was

103. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 301(a), 124 Stat. 3296.

104. CHESTER, *supra* note 3, at 94 (quoting 7 THOMAS JEFFERSON, JEFFERSON'S WORKS 454 (Monticello ed. 1904)).

105. MADOFF, *supra* note 4, at 68.

106. *Id.*

107. *Id.* at 69.

108. *Id.* at 70.

109. Pub. L. No. 97-34, 95 Stat. 172.

110. *See* I.R.C. § 2056(c)(1) (West 1954) (repealed 1981).

111. *See id.* § 2056 (1982).

112. A transfer of property outright obviously qualified. So did a transfer of property in trust, if the donee spouse was the sole income beneficiary and the donee spouse had a general power of appointment over the trust assets. *Id.* § 2056(b)(5) (West 1954). A third possibility was the so-called estate trust, in which the donee spouse did not need to be entitled to the trust income currently if the terms of the trust provided that what was not distributed to the donee spouse would

also available for "qualified terminable interest property" (QTIP).[113] Essentially all that was required of a QTIP trust was that the donee spouse be entitled to all of the income currently. This slashed the cost of the marital deduction.[114] After ERTA, the donor spouse could retain control over the ultimate disposition of the transferred assets by designating the remainder beneficiaries either outright or in further trust. Not surprisingly, QTIP trusts became instant best sellers. Not only did they allow the donor spouse to retain ultimate control, but because the marital deduction was quantitatively unlimited, it was no longer necessary to resort to the charitable deduction to achieve the much-sought-after zero-tax estate. A husband, for example, could leave his entire estate, no matter how large, via a QTIP trust for the benefit of his wife, remainder in continuing trust to his children and then to his grandchildren, and be confident that at his death no federal estate tax would be due.[115]

The utility of these changes in day-to-day estate planning was immediately apparent.[116] Professor Chester has shown, however, that these changes were particularly important for those with dynastic aspirations.[117] Prior to ERTA, given the quantitatively limited nature of the marital deduction, the only way to "zero out" a sizable estate was to resort to the charitable deduction. That meant that even in the case of a married donor, as much as half of the estate was necessarily dissipated, passing either to charity or as taxes. Moreover, given the qualitative limitations on the marital deduction, the half that went to the donee spouse was *also* "lost," in the sense that it was the donee spouse who controlled the ultimate disposition of the assets. Under the best of circumstances, the donor spouse could only hope that, when the time came, the donee spouse would share the donor spouse's dynastic aspirations. In the worst-case scenario, the donee spouse would remarry and produce children by another, in which case even the dynasty's bloodline was at risk. After ERTA, the entire estate, no matter how large, could escape taxation via the marital deduction. Resort to charity was necessary only when the donor had no spouse or did not want to make a large

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be accumulated and that whatever remained at the donee spouse's death would go to the donee spouse's *estate*. Rev. Rul. 68-554, 1968-2 C.B. 412.

113. I.R.C. § 2056(b)(7) (1982).

114. The entire value of the QTIP trust is instead includible in the donee spouse's gross estate. *Id.* § 2044.

115. Actually, less than the entire estate usually went via the QTIP trust. Part went via a "credit-shelter bypass trust" designed to ensure full utilization of the husband's unified credit. There would still be no tax due at the husband's death. The point of the second trust was to avoid inclusion in the wife's gross estate and thus to minimize the tax burden on *her* death.

116. *See, e.g.*, Mark L. Ascher, *The Quandary of Executors Who Are Asked to Plan the Estates of the Dead: The Qualified Terminable Interest Property Election*, 63 N.C. L. REV. 1, 2 (1984) (noting contemporaneously that "[i]f elected by the executor, QTIP status allows an estate to claim the federal estate tax marital deduction for a devise of a life estate to the testator's spouse with the remainder passing to persons of the testator's choosing").

117. CHESTER, *supra* note 3, at 94, 102–03.

spousal transfer. By using a QTIP trust, the donor spouse could, at the relatively meager cost of granting the donee spouse a life interest, ensure both a zero-tax estate and perpetuation of the entire estate down the donor spouse's own bloodline. Thus, it was ERTA, far more than the early Massachusetts case law that Professor Friedman highlights,[118] that set the table for dynastic estate planning.

And then there is the assertion that the transfer taxes have never been effective at breaking up concentrations of wealth.[119] Such assertions have always struck me as dubious. How on earth can we know how much more concentrated wealth would be today if there had never been an estate tax? Professor Chester offers an irrefutable response: "Whether or not [the estate tax] accomplish[es] much in the way of redistribution, such a tax . . . [is] important as a symbol. A nation that professes so strongly to value equal opportunity cannot long be seen as allowing large fortunes to pass between generations completely unscathed."[120] Moreover, though the transfer taxes have never generated a large portion of the government's revenue, they generate far more than they cost to administer. So they could be a reliable source of additional revenue, especially as the baby boomers, with their massive wealth, begin to die.[121] With annual deficits in the trillions of dollars, surely we ought not leave *this* stone unturned.

In his concluding chapter, Professor Friedman argues that whether the Dead Hand is "getting weaker or stronger" is a "fairly complex" story.[122] Plainly, we have turned our backs on Thomas Jefferson. How else can we explain the fact that we now defer even more to the Dead Hand than the English? Though the English have never permitted spendthrift trusts, we have done so for more than a century. In England trust beneficiaries have always been able to terminate trusts by mutual consent, but since the turn of the last century in the United States, trust beneficiaries have had to wait until each of the settlor's material purposes has been fulfilled. In both countries the death taxes have sometimes seemed stiff, at least on paper, but, for the lucky families of American decedents who died in 2010, the federal estate tax was only for those who chose to pay it.[123] Though both the English and we have long understood the need to limit the duration of private trusts and have relied on the rule against perpetuities to do so, there is now in approximately half the states no effective limit on trust duration. And as though permitting spendthrift trusts were not bad enough, several states now permit settlors to create trusts for themselves while denying their own creditors

118. *See supra* text accompanying notes 31–33.
119. *See supra* text accompanying note 76.
120. CHESTER, *supra* note 3, at 98.
121. *Id.* at 104.
122. FRIEDMAN, *supra* note 2, at 181.
123. *See infra* note 146.

access. In short, we Americans seem to be creating for ourselves a law of inheritance even more amenable to dynastic wealth than that of the English, against whose aristocratic traditions we once chafed. Professor Friedman concludes from all of this that we as a country are no longer uncomfortable with wealth in general or with dynastic wealth in particular. I very much hope he is wrong and have offered at each point in Professor Friedman's analysis an alternative and less far-reaching explanation. As to the most recent events, i.e., the war on the rule against perpetuities and the campaign for self-settled spendthrift trusts, Professor Friedman seems to admit that there is a different explanation:

> But this trend might be somewhat misleading. In the late nineteenth century the law of trusts did evolve in ways that favored rich individuals, rich dynasts . . . . In the late twentieth century, and into the twenty-first, the law smiled much more on rich *institutions*: notably the banks and trust companies. These institutions formed a powerful lobby. They were a strong and focused interest, and they were usually able to get their way. Individuals, even rich individuals, were a more diffuse interest. It is a maxim of political science that, in the legislative halls, even a small, focused interest beats out a larger but diffuse interest.[124]

In other words, the recent changes in the law of trusts, which may well favor those with dynastic ambitions, were not enacted at the behest of those best situated to take advantage of them. They were enacted at the behest of the financial-services industry. They say little, if anything, about our collective attitude toward wealth generally or toward dynastic wealth in particular. Nor do they say anything at all about good policy. Indeed, they were often enacted after consultation with only a small bar committee composed primarily of estate planners and probate practitioners, many with close ties to the financial-services industry.[125]

Ultimately, Professor Friedman seems to believe that worries about the extent of the Dead Hand are overblown:

> The brutal fact remains: the dead are definitively dead. The dead "control" beyond the grave only insofar as living people let them do so. In the long run, the dead run nothing. Even in a supposed perpetual trust, charitable or not, the dead hand reigns but does not rule. Like modern kings and queens, its power ebbs away. The evolution of the cy pres doctrine; the decay of the Claflin doctrine; the

124. FRIEDMAN, *supra* note 2, at 181.

125. Professor Madoff recounts the nightmarish tale of how Alaska became a trust haven. Basically, a pair of brothers, one a prominent New York estate planner and the other the founder of an Alaska trust company, decided to make it so while on a fishing trip together in Alaska. MADOFF, *supra* note 4, at 81. For the company's version of the story, see Douglas J. Blattmachr, *The Genesis of Alaska Trust Company*, ALASKA TRUST COMPANY, http://www.alaskatrust.com/index.php?id=57.

> hegemony of professional managers in the large foundations—these all demonstrate that, practically speaking, the living rule the dead, not vice versa.[126]

With respect, that argument proves much too much. Of course, we *could* wrest *everything* from the dead. But we never have. More importantly, we seem recently, and for all the wrong reasons, to have ceded to the dead even more sway. This is a trend that demands reexamination.

In fact, others have begun such a reexamination. Professor Chester, for example, has concluded that there are substantial implications for our national identity in the increased reach and longevity of the Dead Hand:

> The genius of our system, or at least the secular tradition that has dominated it, is that, whatever the frailties of one generation, this tradition can easily accommodate the ethos of each succeeding generation. The current financial elite, however, is trying to cement into place legal rules that will perpetuate its hegemony over the generations that will follow.[127]

And again, "[T]he ultimate question for policy makers is whether property tied up for generations within a family, generally subject neither to voluntary alienation by beneficiaries nor the rights of creditors, is a good thing for society as a whole."[128]

Professor Madoff's book, too, openly questions the increased reach of the Dead Hand. Even its subtitle, *The Rising Power of the American Dead*, leaves no doubt that Professor Madoff has evaluated the trend and found it wanting. It implies what should be obvious—that the rising power of the dead comes at the expense of the living. Nor does she shy away from saying this directly: There is "an inevitable trade-off. Whenever we grant rights to the dead, we invariably affect the living."[129] More directly to the point,

> By failing to tax inherited wealth and allowing the creation of perpetual private trusts, we allow the dead to impose their wishes on future generations. More troubling, we are allowing them to establish a new aristocracy made up of individuals who will have access to large amounts of untaxed wealth to meet their every need and desire while being immune from claims of creditors.[130]

This, she concludes, "threatens our most fundamental values. . . . [Our] founders . . . consciously attempted to establish a nation that would be largely free from the strictures of the past. Over time, however, we have

126. FRIEDMAN, *supra* note 2, at 182–83.

127. CHESTER, *supra* note 3, at 39; *see also id.* at 115 ("[T]he creation and perpetuation of a hereditary aristocracy would contradict many of the ideas fundamental to the founding of America itself.").

128. *Id.* at 115.

129. MADOFF, *supra* note 4, at 152.

130. *Id.* at 154–55.

forgotten what our founders knew, and today we are re-creating the very world from which they sought to distance themselves."[131] Professor Chester (I think)[132] and I could not agree more.

Professor Madoff then asks why these changes have occurred. Mostly, she blames the political process. She mentions, for example, "the stealth nature" of the changes: "The larger picture has gone unnoticed because change has occurred within [discrete] areas of the law, and often at the state level."[133] When the relevant committee of the local bar association recommends a package of proposed changes to the probate code, no bells begin to ring and no warning lights begin to flash. The committee states truthfully that it has vetted the proposed changes with all of the "relevant" groups, like the local bankers' and accountants' groups, and the legislature rubber-stamps the changes, probably without hearings. Professor Madoff adds,

> Finally, the story of the American law of the dead would not be complete without recognition of the effect of money on legislation. It is significant that the areas in which American law has grown most dramatically . . . not only appeal to individuals' desire to exert posthumous control but also appreciably benefit corporate interests. By using interests of the dead as a decoy, these entities have succeeded in enriching their own property interests. Although financial gain may be the driving force behind these changes, corporations are not the ultimate villains. Businesses are *a*moral, simply doing what our society tells them to do: maximize profit. The blame lies with legislators, who have responded to corporate demands even when they have not best served the needs of American society at large.[134]

I would tell the story only a bit differently. It is not as though all of the banks and the entire estate planning community woke up one morning in the late 1990s and decided that they wanted to market dynasty trusts and asset-protection trusts. But some did.[135] In 1995, for example, Delaware repealed its rule against perpetuities as to personal property held in trust.[136] And in 1997, Alaska, followed almost immediately by Delaware, blessed self-settled spendthrift trusts.[137] What followed was a race to the bottom, with

131. *Id.* at 155.

132. *See* CHESTER, *supra* note 3, at 21 ("It would appear that the American fondness for dead hand control . . . may be enabling the creation of the very aristocracy that our country originally rebelled against."); *id.* at 74 ("[A]ttempts to extend dead hand control . . . speak of a desire to endow a continuing aristocracy, the very institution this country's founders revolted against.").

133. MADOFF, *supra* note 4, at 155.

134. *Id.* at 155–56.

135. *See supra* note 125.

136. 70 Del. Laws 238 (1995) (codified at DEL. CODE ANN. tit. 25, §§ 503, 504 (2009)). In 1983, South Dakota had enacted similar legislation. 1983 S.D. Sess. Laws 523 (codified at S.D. CODIFIED LAWS §§ 43-5-1 to 43-5-9 (2010)).

137. *See infra* note 144.

legislature after legislature being asked to protect its own financial-services industry from out-of-state competition by enacting legislation that would permit it to market dynasty trusts, asset-protection trusts, or both.[138] In the ensuing rush, many state legislatures defaulted on their obligation to engage in any meaningful policy analysis.[139]

For a long time in this country, only the courts and the legislatures had any real role in effectuating law reform. For nearly a century, however, there have been two highly influential and relatively independent additional sources of law reform: the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL). The ALI produces the Restatements of the Law, and NCCUSL promulgates the Uniform Acts. Neither organization has yet enlisted in the war on the rule against perpetuities or volunteered for duty in the campaign for self-settled spendthrift trusts. Just this last May, at its annual meeting, the ALI officially repudiated the perpetual-trust movement: "It is the considered judgment of The American Law Institute that the recent statutory movement allowing the creation of perpetual or multiple-centuries trusts is ill advised."[140] At that same meeting, the ALI also approved a new approach to perpetuities, one that would, in general, limit the duration of Dead Hand control to two younger generations.[141] NCCUSL's current offering on perpetuities remains the Uniform Statutory Rule Against Perpetuities (USRAP), which combines the traditional rule against perpetuities with a 90-year wait-and-see period. It is true that USRAP predates the perpetual-trust movement. Still, it is hard to imagine that NCCUSL would abandon the rule against perpetuities anytime soon given the fact that, at its high-water mark, USRAP was adopted by approximately half the states. Indeed, Professor Waggoner, who served as Reporter for both the Third Restatement of Property and USRAP, recently hinted that a new uniform perpetuities act tracking the new Restatement position may be in the offing.[142] Likewise, after full-blown consideration, both the ALI and NCCUSL have officially refused to extend spendthrift

138. For other accounts, see *supra* notes 41–45 and accompanying text and *infra* note 144 and accompanying text.

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

140. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS ch. 27, intro. note at 126 (Tentative Draft No. 6, 2010); *see also* Lawrence W. Waggoner, *Curtailing Dead-Hand Control: The American Law Institute Declares the Perpetual-Trust Movement Ill Advised* 1 & n.1 (Univ. of Mich. Law Sch. Pub. Law & Legal Theory Working Paper Series, Working Paper No. 199, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1614934.

141. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 27.1 (Tentative Draft No. 6, 2010); Lawrence W. Waggoner, *The American Law Institute Proposes a New Approach to Perpetuities: Limiting the Dead Hand to Two Younger Generations* (Univ. of Mich. Law Sch. Pub. Law & Legal Theory Working Paper Series, Working Paper No. 200, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1614936.

142. *See* Waggoner, *supra* note 41, at 5; Waggoner, *supra* note 140, at 11.

protection to trust settlors.[143] In short, the rigorous sort of policy analysis that the legislatures should have engaged in has begun.

It appears as well that the wind may be going out of the sails of both trends. The campaign for self-settled spendthrift trusts began in 1997 when Alaska and Delaware started competing for the asset-protection-trust business. More than thirteen years later, only ten additional states have joined them.[144] In contrast, during the same time frame, the war on the rule against perpetuities turned quite ugly, claiming casualties in approximately half the states. On this front, too, the carnage seems finally to have slowed. Perhaps, with clear guidance from both the ALI and NCCUSL and with the insights of academics such as those whose efforts we consider here, it will be easier in the future to turn back assaults in the remaining legislatures. In a number of legislatures these efforts have already gone down to defeat.[145] In

143. *See* UNIF. TRUST CODE § 505(a)(2) (2005); RESTATEMENT (THIRD) OF TRUSTS § 58(2) cmt. e (2003). By and large, the academic community, too, has rejected self-settled spendthrift trusts. *See, e.g.*, Karen E. Boxx, *Gray's Ghost—A Conversation About the Onshore Trust*, 85 IOWA L. REV. 1195, 1201 (2000) (concluding that self-settled spendthrift trusts can do massive damage to our system of civil enforcement); Randall J. Gingiss, *Putting a Stop to "Asset Protection" Trusts*, 51 BAYLOR L. REV. 987, 988 (1999) (arguing that steps must be taken to eliminate the use of self-settled spendthrift trusts); Henry J. Lischer, Jr., *Domestic Asset Protection Trusts: Pallbearers to Liability?*, 35 REAL PROP. PROB. & TR. J. 479, 493–94 (2000) (stating that the self-settled spendthrift trust is a mixed bag from a policy perspective); Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1043 (2000) (highlighting the "vociferous opposition" to self-settled spendthrift trusts). For opposing viewpoints, see Robert T. Danforth, *Rethinking the Law of Creditors' Rights in Trusts*, 53 HASTINGS L.J. 287, 288 (2002); Adam J. Hirsch, *Fear Not the Asset Protection Trust*, 27 CARDOZO L. REV. 2685, 2686 (2006).

144. Currently, there are, more or less, twelve "asset-protection trust" states. Their statutes, arranged by effective date are ALASKA STAT. § 34.40.110 (1997); DEL. CODE ANN. tit. 12, §§ 3570–76 (1997); NEV. REV. STAT. §§ 166.010–.170 (1999); R.I. GEN. LAWS §§ 18-9.2-1 to -7 (1999); UTAH CODE ANN. § 25-6-14 (LexisNexis 2003); MO. REV. STAT. § 456.5-505(3) (2004); OKLA. STAT. ANN. tit. 31, §§ 10–18 (West 2004); S.D. CODIFIED LAWS §§ 55-16-1 to -16 (2005); TENN. CODE ANN. §§ 35-16-101 to -112 (2007); WYO. STAT. ANN. §§ 4-10-505, 4-10-510 to -523 (2007); N.H. REV. STAT. ANN. §§ 564-D:1 to -D:18 (2008); 2010 Haw. Sess. Laws 182. Is it fair to point out that, by and large, these are among our least populous states? Or that none is a major money center? Might it be that the legislatures in these states are more susceptible to influence by a determined few? Or especially interested in attracting or retaining trust business?

145. *Compare* TEX. PROP. CODE ANN. § 112.036 (West 2010) (establishing the traditional version of the rule against perpetuities, subject to judicial reformation), *with* Tex. H.B. 1608, 77th Leg., R.S. (2001) ("An interest in a trust is not good unless it must vest, if at all, not later than 1,000 years after some life in being at the time of the creation of the interest." (alterations and emphasis omitted)). For a nice account of this incident, see STANLEY M. JOHANSON, JOHANSON'S TEXAS PROBATE CODE ANNOTATED XVII (2001 ed.). Georgia had a similar experience. *See* Verner F. Chaffin, *Georgia's Proposed Dynasty Trust: Giving the Dead Too Much Control*, 35 GA. L. REV. 1, 3, 9, 25–26 (2000) (arguing against proposed legislation). *Compare* GA. CODE ANN. §§ 44-6-200 to 44-6-206 (2010), *with* A Bill to Abolish the Rule Against Perpetuities, H.B. 1764, 1999–2000 Sess. (Ga. 2000) ("The rule against perpetuities is abolished."). *Compare also* N.Y. EST. POWERS & TRUSTS LAW § 9-1.1(b) (2008) (establishing a relatively traditional version of the rule against perpetuities), *with* An Act to Amend the Estates, Powers and Trusts Law in Relation to the Rule Against Perpetuities, A.B. 4924, 228th Leg., Reg. Sess. (N.Y. 2005) (providing that the rule against perpetuities would not apply to an interest in trust if the trustee had unlimited power to sell trust assets and one or more persons had unlimited power to terminate the trust).

the vast majority of states, spendthrift restrictions remain unenforceable as to the settlor's own interest, and, in about half the states, there are still reasonable limitations on the duration of private trusts.

Even on the tax front there is some room for optimism. Although Congress fiddled for nearly a decade after setting fire to the estate tax and seemed throughout much of 2010 to sanction the repeal, the estate tax was always scheduled to reappear in 2011. Indeed, when Congress eventually got around to reconsidering the fate of the estate tax, it wiped from the books the statutory language that had implemented the repeal, thereby retroactively reimposing the estate tax, albeit with staggeringly high exemption amounts and rates significantly lower than those with which we have become familiar.[146]

Thomas Jefferson knew a little something about aristocracy. He therefore did his best to ensure that we would remain free of the threats it poses to egalitarianism and republican government. That is why he reminded us that the earth belongs to the living and urged us to keep it that way. I am glad he does not know how far we have recently strayed. For in a society that cherishes testamentary freedom, as shown not only by the words of our rhetoric but also by the force of our laws, the estate tax and the rule against perpetuities have until lately been our primary brakes on the accumulation and propagation of dynastic wealth. Yet both have recently been curtailed. Fortunately, it would not be hard to get back on the right path.[147] All we really need are sensible rules that end trusts after a reasonable period of time, allow legitimate creditors reasonable access to debtors' wealth, and impose a reasonable tax at death.[148]

146. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 301(a), 124 Stat. 3296. Presumably to avoid litigation over the constitutionality of a retroactive reimposition of the estate tax, Congress allowed the executors of decedents who died in 2010 to opt out of the estate tax. *Id.* § 301(c). The downside of this election was that the estate remained subject to the modified carryover basis rules that accompanied estate tax repeal. *Id.*

147. If Congress were to limit the duration of the GST exemption to two generations, it could kill or wound two birds with one stone. The transfer taxes would be a bit more effective, and the face that launched the war on the rule against perpetuities would be much less beguiling. *See supra* note 41.

148. *See* CHESTER, *supra* note 3, at 41 (arguing for "pragmatic legal rules" that would end trusts after a reasonable period, redistribute some wealth through taxes, and allow legitimate creditors access to one's assets).

The book expands on a viral article, also titled The Uninhabitable Earth, which Wallace-Wells published in New York in the summer of 2017, and which frightened the life out of everyone who read it. Writing at length, he is even more remorseless in his delineation of what the not nearly distant enough future probably holds for us.Â Wallace-Wells identifies a tendency, even among those of us who think we are already sufficiently terrified of the future, to be strangely complacent about the figures.Â plastic than fish in the planetâ€™s oceans. The margins of my review copy of the book are scrawled with expressions of terror and despair, declining in articulacy as the pages proceed, until itâ€™s all just cartoon sad faces and swear words. Facebook. Twitter. I think we can see a more radical Jefferson in this letter, one who may have changed in some ways after holding the Presidency, but Iâ€™m not sure. What I am sure about is that this letter has a few strange elements I canâ€™t quite put together, and there are many teachers of mine and teachers of my teachers who know how to navigate this far better.Â Our â€œself-evidentâ€ principle about the earth belonging to the living, along with the expiration of debts every 19 years, allows us to say the French should not be kicked off their land, even with that amount of debt. Paragraph 6. Our 19 year term makes it clear what one generation is doing to another when they rack up debt â€“ theyâ€™re making the future literally pay. Set in medieval England, "The Pillars of the Earth" is a gripping tale of the passions, intrigue, politics and greed surrounding the construction of a 12th century cathedral.Â Does this best selling book set in 12th century England live up to the hype? Let's dig into The Pillars of the Earth and find out Plot Summary. What's this book about? The central plot element of The Pillars of the Earth is the construction of a new cathedral in the fictional English town of Kingsbridge during the 12th century. But the story is really about the conflicts between the people building the cathedral and those who want to destroy it. It is the early 12th century and England is about to erupt into civil war.