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Immortal Longings: Perpetuity in Context

LAWRENCE M. FRIEDMAN†

INTRODUCTION

When the Sleeper Wakes is a weird and dystopian novel by H. G. Wells, written at the very end of the nineteenth century.[1] The main character, Graham, goes into some kind of trance, and sleeps for some 200 years.[2] He wakes up into a completely different world, an unrecognizable world, a world controlled by a mysterious Council, which, as Graham wakes up, appears to be threatened with revolution from the mass of the population, whose commander is a fairly ruthless leader, Osrog.[3]

Graham's cousin, a rich man, had died and left money to Graham.[4] The money had been put in the hands of trustees.[5] An American, whose children had died, left Graham more money, which was added to the principal of the trust. "Money attracts money";[6] as Graham slept over the years, the trustees (who had over time morphed into the Council) managed this fortune quite shrewdly.[7] They hid the fact that

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[1] H. G. WELLS, WHEN THE SLEEPER WAKES (1899).

[2] *Id.* at 30.

[3] *Id.* at 50.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 67.

[7] *Id.*

the fortune was growing, growing, growing.[8] The Council "kept on adding to the money";[9] they bought up everything they could, and by the time the "Sleeper" woke up, he (through the Council) owned half the wealth of this planet.[10] The Council ruled, in dictatorial fashion. Graham himself was potentially an economic power of almost limitless dimensions. Council rule was safe, and the members of the Council had nothing to fear so long as Graham was sleeping his apparently endless sleep. But once he woke up, in a mysterious new world, he was a deadly threat to the Council. The Council responded. There was an attempt to assassinate Graham.[11] But it failed; he escaped; and a political revolution followed shortly, which overthrew the rule of the Council.[12]

Wells was a brilliant writer, whose vivid imagination helped mold the genre of science fiction. He was not a lawyer, and it seems unlikely that he knew anything about a famous English case, *Thellusson v. Woodford*, decided at the very end of the eighteenth century: a full century before Wells' novel appeared in print.[13] The will of Peter Thellusson, a man of enormous wealth, was at the heart of this case. Thellusson was originally from Geneva, Switzerland.[14] His father had been prominent and well-to-do.[15] Peter Thellusson settled in England, where he was extraordinarily successful, financially speaking; he was able to add greatly

[8] *Id.*

[9] *Id.* Wells revised the work, and published it as *The Sleeper Awakes* in 1910; but the essential plot remained the same.

[10] *Id.*

[11] *See id.*

[12] *See id.*

[13] Thellusson v. Woodford (1799) 31 Eng. Rep. 117; 4 Ves. Jun. 227. *See* Herbert Barry, *Mr. Thellusson's Will*, 22 VA. L. REV. 416 (1936); an exhaustive account of the will and what happened afterwards is in PATRICK POLDEN, PETER THELLUSSON'S WILL OF 1797 AND ITS CONSEQUENCES ON CHANCERY LAW (2002).

[14] Barry, *supra* note 13, at 417.

[15] *Id.*

to his wealth.[16] His vast fortune included large estates in England and in the Caribbean colonies.[17] He died in 1797, survived by a wife, three sons and three daughters, and a flock of grandchildren.[18] In his will, he provided very nicely for the family: gifts that amounted to over £137,000.[19] But the rest—the bulk of the estate, which came to more than £600,000—was left in the first instance to nobody: Thellusson, for whatever motive, ordered the money to be held in trust.[20] The trustees were not to distribute the income; rather, the income was to be accumulated and added to the principal.[21] As the principal grew, the trustees were to buy more land. The trust was to last during the lifetime of all of Thellusson's descendants who were alive at the time he died.[22] (Two grandchildren, born a few months after his death, also qualified).[23] When the last of his living descendants turned into a dead descendant, the trust would come to an end. It would at that point be distributed, but only to those who qualified as an "eldest male lineal descendant" of one of his sons.[24] There was some question as to exactly what this meant; but the most likely meaning was as a kind of throwback to the system of primogeniture. What was clear was that daughters and their children, and the female descendants of sons, along with the sons of other sons besides the "eldest," were totally excluded from sharing in this inheritance.

In a way, this extraordinary will was asking for lawsuits;

[16] *Id.*

[17] *Id.*

[18] *Id.* at 418.

[19] *Id.* at 421.

[20] *Id.*

[21] *Id.* at 422.

[22] *Id.* at 423.

[23] *Id.* at 418.

[24] *Id.* at 421.

and that is what it got. The widow and children brought an action against the trustees, asking the court to declare the trust void.[25] Lawsuits multiplied on all sorts of subsidiary issues. The main question, however, was whether the whole scheme was valid. Law teachers will see right away that Thellusson's scheme, whatever else might be wrong with it, did not run afoul of the dreaded rule against perpetuities, since it would not last longer than this rule allowed. (I will deal with the rule against perpetuities later on). In normal trusts, the income, instead of piling up and used solely to make the estate grow bigger and bigger, would get paid out to beneficiaries, year by year or quarter by quarter, until the trust ended. And if it ended within the limits allowed by law (which was the case here), such a trust would present no legal problem. But this kind of arrangement was precisely what the will did *not* do. Instead, none of his children and grandchildren would ever get a penny of the income. Instead, the Thellusson trust would snowball; it would grow and grow and grow, like the fortune in Graham's name in the novella by H. G Wells. In the end, it would be paid out, in two enormous piles, to the eldest male descendant of two of Thellusson's sons.

The plaintiffs, members of the family, went to court and hurled thunderbolts at the trust: the scheme was "cruel and deceitful"; it was "unnatural"; it was the result of an "extrinsic and outrageous vanity."[26] The trust, as one of the lawyers put it, would place "immense masses of landed property in the hands of a few individuals," a result that was "impolitic and pernicious."[27] The court certainly agreed that Thellusson's plan was highly undesirable, to say the least, since the trust might expand to monstrous size, sucking up a vast proportion of the wealth of England. It would not go as

[25] *See Thellusson*, 31 Eng. Rep. at 117.

[26] These were the words of counsel for the family, quoted in Barry, *supra* note 13, at 425.

[27] *Thellusson*, 31 Eng. Rep. at 117.

far as the accumulation Wells would describe in his novella: that process went on for two centuries. But the Thellusson trust seemed bad enough. Yet in the end, the English court, troubled as it was by the plan, decided to uphold the Thellusson trust. The judges cited some earlier cases, which had included accumulation provisions of one sort or another; the courts had upheld these arrangements. The Lord Chancellor, despite his distaste for the "unkind" and "illiberal" scheme, felt it was not his role "to make a new law."[28] Perhaps this was simply a failure of imagination; courts make "new law" all the time. But in this case, they declined the opportunity.

What was so offensive about the Thellusson estate? One writer has suggested that Peter Thellusson represented new money: money made in banking and finance. Power and wealth in England had been in the hands of the landed gentry—old families and members of the nobility—who lived on the land in great houses, supported by the rents of their tenants. This class might indeed have felt a certain outrage at the idea that a huge fortune, controlled by a new family and designed by an actual foreigner, would be able (at least in part) to displace the traditional ruling class by buying up freehold estates as the trust accumulated immense wealth, year after year.[29] The idea that this vast pile of money, growing like a cancer, could metastasize and swallow up a big chunk of England's wealth was profoundly unsettling. So unsettling, in fact, that Parliament stepped in. A law of 1800, the so-called Thellusson Act, severely limited accumulations, restricting them to a few types of situation.[30] The Act could not, of course, apply to the trust under Thellusson's will; that trust, after some delays, actually went into effect.

But things never worked out the way Thellusson had

[28] *Thellusson*, 31 Eng. Rep. at 173.

[29] For this suggestion, see Patrick Polden, *Panic or Prudence: The Thellusson Act (1800) and Trusts for Accumulation*, 45 N. IR. LEGAL Q. 13 (1994).

[30] The Thellusson Act 1800, 39 & 40 Geo. 3, c. 98.

expected. Or, indeed, the way that Parliament had feared. Political and economic disaster struck at some of the core assets. Slave plantations in the West Indies lost much of their value. The English land market, too, was not as profitable as expected. Management of the estate was fairly dicey. But above all, the legal system itself thwarted Thellusson's scheme; the Court of Chancery, and the parasitical plague of lawyers and lawsuits wreaked havoc. Four decisions in the House of Lords, and a flock of decisions in Chancery, formed the "tip of a vast iceberg of decrees and orders," indeed, more than 950 orders, and at least 780 reports.[31]

Courts and lawyers had taken so many bites out of the estate, that in the end, around 1860, the estate was not much bigger than it had been when Peter Thellusson died.[32] It was still, of course, serious money; but nothing like what it might have been, and what Parliament had been so afraid of. When the dust finally settled, and the trust came to an end, all those years of accumulation had done very little; the estate fell far short of Peter Thellusson's goal. The legal entanglements of the Thellusson estate were so notorious that they may well have served as the model for *Jarndyce v. Jarndyce*, the endless lawsuit in Chancery, which figures so prominently in Charles Dickens' great novel, *Bleak House.*[33]

In short, the nightmare that haunted the English elite, and which moved Parliament to action, was in the end, a dud. The nightmare never turned into reality. The English economy survived. Thellusson's heirs did inherit a tidy sum; but not a fortune that gobbled up most of the country. Wells' nightmare scenario, of course, was science fiction. Nobody then, and nobody now, can sleep 200 years, wake up with a yawn, and pursue normal bodily life. As we will see, some people today do think science can and will make this

[31] POLDEN, *supra* note 13, at 397.

[32] *See* Barry*, supra* note 13, at 425.

[33] CHARLES DICKENS, BLEAK HOUSE (1853).

possible—eventually. But it's not on the horizon right now. And unlike Wells' Graham, or for that matter, Thellusson, even these people do not expect to come into some amazing future fortune.

I. AMERICAN ECHOES

In the United States, the Thellusson bogeyman—a huge, accumulating estate that could swallow up the country—did not seem to be much of a danger. One occasionally hears of the dangers of accumulation. A notable outburst along these lines occurred in a Pennsylvania case, *Hillyard v. Miller*.[34] But the facts and the spirit of this case were totally different from the spirit of Peter Thellusson's plan. Peter Miller wanted to help out "farmers of industrious and sober habits."[35] To achieve this worthy aim, Miller left the residue of his estate to local churches, basically as a fund to make loans to these folks. The heir at law went to court to overturn this plan (and get the money for the family). The case reached the Pennsylvania Supreme Court. The Chief Justice, Gibson, was appalled by Miller's scheme. This was, he said, a plan to "lend the income" of the trust "and increase the capital to infinitude by investing the interest of it . . . in other loans."[36] The consequence would be "the gradual absorption of nearly all the property in the country, which would then be locked up"; a consequence "more prejudicial . . . than that which followed the trusts in Mr. Thellusson's will."[37] The lending, after all, could go on forever. That was intolerable—at least in Gibson's eyes. The court declared this "fund for perpetual accumulation" null and void.[38] Peter Miller's money went, alas, not to "farmers of industrious and sober

[34] *See* Hillyard v. Miller, 10 Pa. 326 (1849).

[35] *Id.* at 326.

[36] *Id.* at 336.

[37] *Id.*

[38] *Id.* at 338.

habits," but to his relatives.[39]

This case and the Thellusson case not only came out differently, they also arose out of different worlds. Peter Thellusson planned to build up a massive fortune, a dynasty of wealth for generations to come. I doubt whether he gave two straws for "farmers of industrious and sober habits." If anything, his trust would swallow up any such farms. His scheme, as we noted, had a certain feudal flavor, though it substituted the nouveau riche (his family, at any rate) for some of the old, landed gentry. Peter Miller's scheme was American to the core, and its ambition was exactly the opposite of Peter Thellusson's. Miller wanted to multiply the corps of "farmers of industrious and sober habits," who would till the soil of his state. American culture and ideology were in the background: the ideology of a society without a landed gentry, a society dominated (except in the South) by family farmers, a nation of small-holders, the world's first middle-class country. It failed because he (and his lawyers) had simply not thought their plan through. They surely never intended the estate to swallow up all of Pennsylvania: quite the contrary. But what they actually prescribed was enough to give Gibson dyspepsia. A clever lawyer would have worked out a way to fund farmers, without (thoughtlessly) providing for a perpetual accumulation. In any event, the plan failed; and Pennsylvania survived, though perhaps with a few less "farmers of industrious and sober habits."

The case, then, was simply an example of botched draftsmanship. It was, in its form, probably unique. On the other hand, Benjamin Franklin in his will proposed something quite similar, and more successfully. Franklin left £1,000 to Boston and £1,000 to Philadelphia to be lent out to young people as seed money for the formation of

[39] *Id.* at 326. If there was surplus income, beyond what was needed for the loans, Miller's will directed the trustees to endow and build a "hospital, for infirm widows and single women." *Id.* at 335. But these "infirm widows and single women" never got their hospital, since the whole scheme failed.

businesses.[40] The loan money was to be paid back over a ten-year period; interest on the loan was to be 5%.[41] Franklin clearly wanted to be "useful" even after his death;[42] here too there was no dynastic urge, unlike the Thellusson model. Franklin did expect the principal to grow, and to become quite substantial; he estimated that after a hundred years, the principal would amount to £130,000.[43] At that point, the managers were supposed to pay out, "at their discretion," £100,000 for "public works," like bridges, "public buildings, baths, pavements," and whatever else would improve life in the city.[44] The rest of the money would continue for another hundred years, at which point (Franklin thought) it would be truly enormous.[45] The trust would then end, and the cities and their states would divide the money. And, indeed, Franklin's bequest did last the full 200 years.[46] Apparently, the Franklin family did not try to overturn this odd bequest—at least not at first. At the 100-year mark, 1890, his descendants *did* petition a local court in Philadelphia, claiming that the plan violated the rule against perpetuities, and that the money should revert to them; but they lost this battle.[47] The gift, it was held, qualified as a charity, which

[40] MICHAEL MEYER, BENJAMIN FRANKLIN'S LAST BET 12 (2022); Meyer's book is a full account of the history of the Franklin bequest.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 178–85; Franklin's Adm'x v. City of Phila., 2 Pa. D. 435 (C.P. Phila. Cnty.1893); in *Franklin's Estate*, the court also upheld the estate, and pointed out that if the "gift was invalid, the fact was just as apparent when the money was paid out in 1790, as it can be now." The trust would have been upheld back then, and now, "at the expiration of a hundred years," when the trust has been carried out all that time, the claim against it was properly dismissed. *In re* Franklin's Estate, 9 Pa. C. 484, 490 (Pa. Orph. 1891).

made the perpetuities argument irrelevant.[48]

More recently, Charles Walker, a Texan, executed a holographic will, in which he directed a piece of his property to be sold; the proceeds were to be invested in "tax-free U.S. government bonds or insured tax-free municipal bonds."[49] The point was to accumulate (at "6% compound interest") and ultimately build up a fund big enough "to provide a million-dollar trust fund for every American 18 years or older."[50] He thought this noble goal would take "approximately 346 years."[51] Alas, a Texas Court of Appeals, in 2004, frustrated Walker's hopes.[52] The plan was invalid under Texas law.[53] Only a charity had the right to last so long; and simply handing out money to everybody in the country was not (legally speaking) charity.[54]

Walker, in a way, had a thoroughly American motive; there was nothing dynastic about his plan—nothing specifically for his near and dear ones. Benjamin Franklin, like Miller, but unlike Peter Thellusson, also had a thoroughly American motive for his scheme. Despite Gibson, most courts in the United States have seemed immune to the wild fears that the Thellusson plan evoked. They have followed the actual holding in the English case. In short, in the United States, an accumulating trust is valid, so long as

[48] *See Franklin's Estate*, 9 Pa. C. Ct. R. at 490.

[49] Marsh v. Frost Nat'l Bank, 129 S. W.3d. 174, 176 (Tex. Ct. App. 2004).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* at 180.

[54] *Id.* The court also thought that the testator had not evinced a "general charitable intent;" normally, this might have simply killed the whole project. But the court stopped short of doing this. The court remanded the case to the trial court, which was "to reform or construe the trust according to the doctrine of cy pres by giving effect to the general intent of the testator within the limits of the rule [against perpetuities]." *Id.* at 179. How the trial court was to do this was left unclear. On cy pres, and on charitable foundations and trusts, see *infra* note 147.

it does not last past the period set by the rule against perpetuities. It does not matter whether a trust accumulates income or pays the income out at regular periods to beneficiaries. In both cases the boundary line is the same: the rule against perpetuities. Nor does the size of the estate make a difference.[55] A few states were haunted by Peter Thellusson's ghost. These states passed laws cutting back the period of accumulation. But for the most part, states did nothing. Or they simply restated the general proposition. Under New York law, for example, accumulation of income in a trust is valid, so long as "such accumulation is to begin and terminate within the time allowed by the rule against perpetuities."[56] And there the matter rested—at least until recently, as we will see.

II. IMMORTAL LONGINGS

What was Peter Thellusson's motive? What did he have in mind? He was an extremely rich man. He had a large family. He did not, in fact, disinherit them; he left nice slices of his huge estate to his wife and children.[57] They would still be quite rich, comfortably rich, after he died; but not super-rich. The big money, the powerful money—and the vast estates of land—would ultimately go, when the trust terminated, to the eldest living sons of his sons.[58] These ultimate heirs were either not yet born or were little babies at the time Thellusson died. Thellusson himself would of course be long gone when the trust ended; he would never see the results. Perhaps he imagined himself looking down from above, smiling a big smile to see how big and powerful

[55] Gertman v. Burdick, 123 F.2d 924, 933 (D. C. Cir. 1941).

[56] N.Y. EST. POWERS & TRUSTS, § 9-2.1. The statute also provided that if an accumulation went past the rule against perpetuities, it would terminate at the end of the perpetuity period. On the 19th century statutes, see Lewis M. Simes, *Statutory Restrictions on the Accumulation of Income*, 7 U. CHI. L. REV. 409, 411–12 (1940).

[57] *See* POLDEN, *supra* note 13.

[58] *See* Barry, *supra* note 13, at 432.

his estate had become. Perhaps he saw the Thellusson estate as a doorway to some sort of immortality, a monument (in a way) like the giant tombs of the Pharaohs. He wanted, perhaps, to be the grandest tiger in the jungle; to show the old elites the power of new money; to demonstrate the vitality of a man like himself, whose money could gobble up land and power, and (perhaps) oust the members of a decaying aristocracy. All this, however, went along with an almost feudal preference for eldest sons of eldest sons. Almost inevitably, his heirs would enter the ranks of the nobility—which in fact actually happened. But his overwhelming ambition was not only—or even mostly—for his family as such; it was for his "estate," almost as if this was some sort of independent entity, an institution, something which would survive and grow and become more and more powerful as the years went by.

Unlike the "Sleeper" in Wells' story, who never intended to sleep for centuries, and never intended to suck in limitless wealth, Peter Thellusson did choose to extend himself, and his wealth and power, long past the date of his death. He was, in other words, looking for a kind of vicarious immortality. A search of that sort is not unusual: it has taken various forms in the legal system (and in society) and has invoked different reactions as the world revolves and society changes. Most people dread the thought of dying. As the saying goes, the only sure things are death and taxes. In fact, taxes can be avoided, especially if you hire the right lawyer. But no lawyer can save you from death. What a lawyer can do, or try to do, is to project your wishes beyond the grave (for a price). This can provide a kind of vicarious immortality. And thinking about this might provide some sort of psychological lift; some sort of satisfaction in this vale of tears.

In the natural world, it seems, apparently there *is* immorality of sorts. Not usually, but in some cases. Mayflies have absurdly short lives; rats, mice, and bumblebees live somewhat longer; and even the octopus, a complex and intelligent creature, lives at most a year or two. On the other hand, certain jellyfish seem to be immortal; and creatures as different as lobsters, bristle-cone pine trees, and giant tortoises can keep on going for centuries. Gods do not age and die. The Pharaohs, who thought of themselves as god-like, built tombs for themselves, equipped with what they might need on the other side. Millions of religious people believe in an afterlife, in an immortal soul. Good works, good luck, and a life free of sin can get you into heaven. But life on earth, so far, seems to have strict limits. Thanks to medical science, people are living longer lives than in the past. But longevity has bumped up against real limits. An upper boundary, even for people who exercise; who don't smoke; who eat fruits and vegetables and make sure they get essential vitamins; and who have good genes and good luck. A French woman, Jeanne Calment, is apparently the only person who has made it past 120 years, at least the only one that has been documented (stories without evidence, about people who live much longer, can be safely ignored).[59] Living past 110 is exceptionally rare, it seems; and almost all of these long-term survivors have been women.[60]

In Karel Capek's famous play, *The Makropoulos Affair* (the opera by Leos Janacek is even better known), the main character, a woman, is over 300 years old.[61] (She changes her name from time to time, but always keeps the initials EM). Some sort of elixir, which she took at age 42, did the trick. At the end of the play and the opera, it is time to take the elixir again in order to get an extension of this long, long life; but

[59] *See Jeanne Calment, 122, World's Oldest Person (and Woman) Ever,* GERONTOLOGY RSCH. GRP., https://grg.org/sc/scindex.html (last visited Aug. 3, 2023).

[60] *See GRG World Supercentenarian Rankings List*, GERONTOLOGY RSCH. GRP. (July 6, 2023), https://grg.org/WSRL/TableE.aspx.

[61] Leos Janacek wrote the opera, the Makropoulos Affair, in the 1920's, based on a play by Karel Capek (1922). *See also The Makropoulos Affair JW I/10*, LEOSJANACEK.EU, https://www.leosjanacek.eu/en/makropulos-case/ (last visited July 6, 2023).

she refuses, and ends up choosing death. Her "unending life has come to a state of boredom, indifference, and coldness. Everything is joyless."[62] Vampires, like the notorious Count Dracula, also do not die (you can of course kill vampires, but you have to use the right technique);[63] whether vampires get bored after a while seems unknown. Few people, however, would willingly choose to live on as a vampire. Imagine centuries of biting people, avoiding sunlight, and never enjoying a solid meal.

Still, for people here on earth, the search goes on for some pale but satisfying substitute for immortality. Many people take an inordinate interest in their future funeral or burial; some want to be cremated and have their ashes strewn in the sea, or in some wild but beloved place. Others want to be buried in a favorite spot in a favorite garden, or under a beautiful tree. Many people want their graves to be managed and tended, as if there was actually someone resting there underneath the ground. There is money to be made in the funeral business; and in providing expensive caskets. The laws allow people to give directions about funerals and other such matters—directions which can be enforced. Nobody can have sex after death; but there are people who would like to be able to reproduce (asexually) after death, using frozen sperm, or frozen eggs.[64]

The vast majority of us, of course, feel that death, alas, is the end, at least here on earth, though not necessarily

[62] Bernard Williams, The Makropoulos Case: Reflections on the Tedium of Immortality, in PROBLEMS OF THE SELF ch. 6 (1973).

[63] Dracula figures in Bram Stoker's novel, DRACULA (1897), which was a huge success; the movie of the same name, starring Bela Lugosi as the Count (Tod Browning & Carl Laemmle Jr. 1931), was also a huge success. On Dracula, see JIM STEINMEYER, WHO WAS DRACULA? BRAM STOKER'S TRAIL OF BLOOD (2013); and, on the vampire in literature and popular culture, see ERIK BUTLER, THE RISE OF THE VAMPIRE (2013). Zombies are another form of the undead, prominent in horror films; nobody sane (of course) would choose the life of a zombie.

[64] RAY MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 18, 41–44 (2011).

final. And the world of the dead is not necessarily sealed off from the world of the living. Séances and other forms of hocus pocus rest on this idea: the idea of talking to the dead, or at least listening to them talking to us. A prominent fake in the nineteenth century, William Mumler, claimed he could make ghostly photos of the dead.[65] He could take the picture of, say, the mother of a soldier who died in the Civil War, and produce the shadowy image of the son on the photographic plate.[66] People enjoy ghost stories; and some people actually believe in ghosts. My guess is that almost nobody thinks that *they* will come back as a ghost, haunting a castle or an old, dark house; or walking around at night holding their severed head in their hands.

A few people have the firm belief that they can go on living after their apparent death; or at any rate can be reborn. They are happy to pay for a chance at this outcome. Vicarious immortality is, however, a much more common goal; and it is also (to a degree) legally possible. This is the realm of the dead hand; the realm of Peter Thellusson; the realm of dynastic trusts and dynasty trusts (these are not the same). It is a realm that was once tightly governed by the dreaded rule against perpetuities, now on the road to extinction; it is also the realm of the charitable foundation. This essay will deal with these various forms of immortal longing.

III. LIFE IN THE DEEP FREEZE

A few people, who have great faith in the progress of medical science, think life is not necessarily a dead-end street. These people arrange to have their bodies frozen solid in the hope that medical science, in time, will find a way to

[65] On Mumler, *see* PETER MANSEAU, THE APPARITIONISTS: A TALE OF PHANTOMS, FRAUD, PHOTOGRAPHY, AND THE MAN WHO CAPTURED LINCOLN'S GHOST (2017).

[66] *Id.*

defrost them and bring them back to life. Early results were fairly disastrous, but the technology has improved. Robert Ettinger, who was apparently the driving force behind modern "cryonics," died in 2011, at the age of 92; his body "was cooled and put in a negative 371-degree Fahrenheit cryonic capsule."[67] Ted Williams, the baseball player, who died in 2002, was "decapitated by surgeons, who then stored his head . . . in a can"; and put his body in a "steel tank, both filled with liquid nitrogen."[68] There are a number of companies that are happy to freeze customers at death: for a price of course. The Cryonics Institute promises "a second chance at life" and claims to be the "world's largest provider of whole-body cryonics."[69] Another company (Alcor) states that a "fulfilling life" doesn't have to come to an end: "Welcome to your future."[70] Apparently, over 150 "humans" and 100 pets have entered the deep freeze era; and about 2,000 more are waiting in the wings to die and get frozen.[71] In a Hollywood movie, *Iceman,* scientists discover the frozen body of a caveman, and are able to defrost him and bring him back to life, none the worse for wear.[72] The movie, of course, is science fiction. But the idea is certainly not unthinkable. Perhaps, as Alcor promises, the "dying process" can be "paused." Not at the moment, but eventually—who knows?

Medical science, of course, has pulled off quite a few miracles; and this might be the next to come. But it's not

[67] Inna Fershtyn, *Assets on Ice: Cryogenic Estate Planning*, LAW OFF. OF INNA FERSHTEYN & ASSOCS., P.C., (Jan. 22, 2018), https://brooklyntrustandwill/assets-ice-cryogenic-estate-planning.

[68] On Williams, see Richard Sandomir, *Baseball: Williams Children Agree to Keep Their Father Frozen*, N.Y. TIMES (Dec. 21, 2002), https://www.nytimes.com/2002/12/21/sports/baseball-williams-children-agree-to-keep-their-father-frozen.html.

[69] CRYONICS INST., https://cryonics.org (last visited July 31, 2023).

[70] ALCOR, https://www.alcor.org (last visited July 31, 2023).

[71] Fershtyn, *supra* note 67.

[72] ICEMAN (Universal Pictures 1984).

exactly imminent. It might take centuries. The defrosted people would open their eyes on a world that would surely be quite strange to them. This was the fate of Wells' Sleeper. The iceman in the Hollywood movie was totally unprepared to face modern urban life. But you do not have to go all the way back to cave people to imagine this kind of culture shock. If someone from the Middle Ages, using a time machine (another science fiction invention of H. G. Wells),[73] was transported magically to our times, what would he or she make of cell phones, computers, jet airplanes, and air conditioning; of skyscrapers, television, and the internet; or for that matter, of modern gender relations; or modern politics; or modern culture in general. Could such people even understand our language?

A super Rip Van Winkle, brought back to life after centuries in the deep freeze, would have problems beyond culture shock. He or she will emerge from sleep stark naked, and completely broke. Providing clothing is not a serious issue, although the fashions in clothing of the year 3000 are pretty unpredictable. Money is a more troublesome problem. But American lawyers are nothing if not inventive, especially when there are fees to be earned. Enter the "Cryonic Suspension Trust." Such a trust has to be, as you can imagine, extremely flexible. And it has to last for centuries at least. As we will see, this is now legally possible. Some perfectly respectable law firms have gone after this small but lucrative market. They have worked out estate plans for people who plan to be frozen. If all goes well, these people will be well-off financially, during their second coming. At least this is what these firms promise. There are, after all, many problems. Waking up from the dead is not a simple matter. As one law firm which drafts such trusts points out, legally the defrosted person is not the same person: legally, that person is dead. He or she could not, for example, "use

[73] H. G. WELLS, THE TIME MACHINE (1895).

the same . . . social security number" or "tax identification number."[74] Not to mention that this person's driver's license has long since expired and would probably not be of much use for automobiles of the future, or whatever replaced them.

"Cryonic Suspension Trusts," and other planning devices along these lines, are of course rather expensive. But after all, frozen suspension is only for those who can afford it; and most people can't, unless the price comes down radically. But if you want a trust fund that will keep you in good financial shape, in this next round of life, and if you also have the money to pay for it, some law firms will gladly show you a number of models; and you can choose the one you want. Whether any of these plans are likely to work out, even if the medical miracle does happen, is another question. Right now, this seems unlikely. But none of us will be around to know the answer to this question.

IV. The Dead Hand

Much more common, and much cheaper, is another, strictly limited, kind of immortality—the dead hand itself: or, to put it another way, the power to control what happens to your wealth after you die. Anybody above the poverty line has at least some of this power. Anybody can simply execute a will, or (more common these days) a living trust that does more or less the same thing.[75] These documents can leave instructions which, almost always, can be and will be carried out after you die. There are legal and formal restrictions: also, nobody is forced to execute a will or a trust. If you fail

[74] Rick Durfee, *Cryonic Suspension Trust: The Ultimate Estate Freeze*, DURFEE L. GRP. (June 15, 2015), https://durfeelawgroup.com/cryonic-suspension-trust/#comments. This firm is located in Mesa, Arizona.

[75] As Ray Madoff has pointed out, copyright is another area where the dead, in a way, have rights—or their estate does, at any rate. Originally, copyright protection was for fourteen years; but copyright law has been revised to make the period of protection longer—for works copyright after 1978, the right lasts 70 years from the death of an author, playwright, or copyright holder. MADOFF, *supra* note 64, at 9.

to do this, or if you execute a document which is somehow defective, the law will make the decision for you. This is "intestacy"; and normally your assets will go to your closest relatives. Still, almost all adults with serious money will make their wishes known. A large and lucrative branch of law, on trust and estates and estate planning, deals with the management and distribution of assets after death.

The law rests, of course, on one simple and basic proposition; you can't take it with you (cryogenic trusts might be something of an exception). But though you can't take it with you, you can decide where it goes when you die (to family, to charity, to friends) and in what proportions. At least in the United States, you can cut off adult children without a penny.[76] In many countries, this is not normally possible. A child who is estranged from a wealthy parent, in the United States, runs the risk of disinheritance. Quite generally, in this country you can decide not only *who* gets your assets but how and when and under what conditions. Moreover, you can project your influence into the future. You can give everything away at once; or you can set up a trust and postpone final distribution for a considerable length of time—more on this later.

The history of what we might call the dead-hand power is long and complex. In feudal days, in England, estates often passed down from eldest son to eldest son. This was the system of primogeniture. "Estate" meant land and the income from land, quite literally. The landed gentry ran society; they had both wealth and power. They lived in style off the rents paid by tenants on their land. As capitalism crept into society, on its silent cat's feet, the dead hand of feudalism lost much of its luster and power. Capital, business, banking, international trade—new money—competed with old money. Thellusson himself represented this kind of new money. As the economic structure changed, the legal order changed accordingly. Legal rules shifted to

[76] Disinheriting a spouse is more difficult.

reflect the economic and social facts of the new elites. Legal doctrine came to disfavor "restraints on alienation"; rules that kept property off the market, property that could not be bought and sold and mortgaged; property that was "tied up" in a family. The nouveau riche could not acquire their nouveau riche-ness if heirs had no power to sell or transfer their land. The common law mutated in the direction of freedom of alienation: less domination by landed estates. In the nineteenth century, the process accelerated. Debts gnawed away at the gentry. Some English aristocrats were forced to sell off their property. Some, in desperation, even sold themselves or their daughters to rich Americans.[77] In more recent times, heavy death taxes dealt a crushing blow to most members of the old aristocracy. Stately homes became tourist attractions, with zoos and gift shops, or ended up in public ownership, in which case these too became tourist attractions.

The church was in some ways a threat to the land market. Land that fell into the clutches of the church could be held there forever. Churches were legally immortal. In the Middle Ages, in England, "mortmain statutes" limited gifts to the church ("mortmain" literally means "dead hand"). The "dead hand" of the church limited, in complex ways, the income of the crown. By the time of the American revolution, most of this dispute was ancient history. Land was in general quite alienable. Churches, however, were still legally immortal; and property given to churches was still within the grips of a dead hand. In the United States, there was a somewhat feeble echo of rules to keep property out of this particular dead hand. The point of these laws was to prevent dying men and women from making death-bed gifts to

[77] In 1895, Consuelo Vanderbilt married the Duke of Marlborough, one of a series of "dollar princesses" who married English aristocrats in order to "revitalize their dwindling inherited fortunes." This is from Madeleine Luckel, *A Look Back at Consuelo Vanderbilt's 1895 Wedding*, OVER THE MOON (May 9, 2018), https://blog.overthemoon.com/fashion/consuelo=-vanderbilt-first-celebrity-wedding/. And, if you were a fan of Downton Abbey—the Earl married a rich American, after all.

churches. These statutes were animated by a vague sense that churches, especially the Catholic Church, took advantage of the dying and indulged in a kind of spiritual blackmail. It was as if they said: here is your last chance to cleanse yourself of sin. The mortmain statutes tried to prevent this: in some of these laws, a gift to charity by will was invalid if the will was made too soon before death. Others provided that, for testators with close family, wills were not allowed to leave more than a certain percentage of the estate to charity. An old Georgia law did both: no one who left a wife, children, or grandchildren, was allowed to make a will that gave more than one-third of the estate to charity; and the will had to be executed at least ninety days before the testator died.[78]

These statutes are now purely historical. None lasted into the twenty-first century. Two factors doomed them. First, gifts to charity no longer had the same social meaning. They no longer froze assets and kept them off the market. Most gifts to charity were gifts of money, stocks, bonds, and similar assets. All of these could be traded, exchanged, and manipulated in the market. In the second place, money given to churches and other religious institutions, though still important, no longer dominated gifts to "charity." More and more, "charity" came to mean gifts and bequests for whatever is in the public interest: education, health, the arts, feeding the hungry. There are few limitations. Courts tend to feel that gifts, outside the circle of family and friends, are basically charitable. The British may have been, in the past, a bit less eager to do this. George Bernard Shaw, the playwright, was exasperated by English spelling, which is quite natural. His will established a trust to be used to create a new alphabet for the English language.[79] This would be

[78] LAWRENCE FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 71 (2009).

[79] *In re* Shaw v. Day, [1957] 1 WLR 729.

totally phonetic. Under the will, a "phonetic expert" was directed to transliterate Shaw's play, *Androcles and the Lion,* into this brand-new alphabet.[80] But in 1957, the Shavian alphabet ran up against the stone wall of the British courts: this trust was for a purpose that was not truly "charitable"; and since only "charitable trusts" could last indefinitely, Shaw's dead-hand plan was invalid.[81] Spelling bees, an English-language specialty, were spared from extinction.

The charitable foundation is, today, the most significant form of legal immortality. Practically every billionaire, and many mere multi-millionaires, are likely to set up a charitable foundation at some point in their lives. Some of them will transfer the bulk of their fortune to their foundation. To be sure, they almost never give away *everything,* either before or after death. They will leave themselves enough for yachts and private jets and collections of modern art. There are exceptions, of course: Charles Feeney, "the billionaire who wanted to die broke," wanted (or said he wanted) to give away his enormous fortune while he was still alive.[82] Well, at least almost all of his fortune. Even Feeney, who said it was a "lot more fun to give while you live," in 2012 set aside $2 million for him and his wife to live on.[83]

There are apparently more than 115,000 foundations in the United States, at the present time; they hold almost a trillion dollars in assets, and they pay out about $64 billion each year.[84] The largest is the Bill & Melinda Gates

[80] *Id.*

[81] *Id.*

[82] Steven Bertoni, *The Billionaire Who Wanted to Die . . . is Now Officially Broke*, FORBES (Sept. 15, 2020, 6:55 AM), https://www.forbes.com/sites/stevenbertoni/2020/09/15/exclusive-the-billionaire-who-wanted-to-die-brokeis-now-officially-broke/?sh=36d83ef93a2a.

[83] *Id.*

[84] *See* CANDID.ORG, KEY FACTS ON U.S. NONPROFITS AND FOUNDATIONS 2 (June 2021).

Foundation, with over $50 billion in assets; in 2021 it gave away $6.7 billion.[85] The Ford Foundation has about $12 billion in assets;[86] the Lilly Endowment, $10 billion.[87] Quite a few foundations are worth more than a billion dollars.[88] The number is almost certain to keep on growing. Foundations, after all, like the church, do not die. Founders die, but not foundations. Foundations can go on forever (if there is a forever). Benjamin Franklin's scheme from the late eighteenth century, which we mentioned before, was still alive in the late twentieth century. Most charitable foundations are more recent, of course; but some have reached a quite respectable age. The Russell Sage Foundation dates from 1907, and is still going strong.[89] Sage was a notorious skinflint; it was his wife, not Sage, who set up the foundation in his name.[90] The Rockefeller Fund dates from 1913,[91] the Duke Endowment from 1924,[92] and the Ford Foundation from 1936.[93] Foundations, big and small, produce and spend income, year in and year out. Most of them seem to have a horror of dipping into principal. Nibbling away at the principal, if it became a habit, would

[85] *See* FOUNDATION FACT SHEET, BILL & MELINDA GATES FOUND. (Dec. 31, 2022), https://www.gatesfoundation.org/about/foundation-fact-sheet.

[86] *See* CONSOLIDATED FINANCIAL STATEMENTS AND REPORT OF INDEPENDENT CERTIFIED PUBLIC ACCOUNTANTS, FORD FOUND. (Dec. 31, 2021).

[87] *See* HISTORY AND FOUNDERS, LILLY ENDOWMENT INC., https://lillyendowment.org/about/history-and-founders/ (last visited July 31, 2023).

[88] *See List of Wealthiest Charitable Foundations*, WIKIPEDIA https://en.wikipedia.org/wiki/List_of_wealthiest_charitable_foundations (last visited July 31, 2023).

[89] *See About the Foundation*, SAGE FOUND., https://www.russellsage.org/about (last visited July 31, 2023).

[90] *Id.*

[91] *See* Rockefeller Foundation Charter, 1913 N.Y. Laws ch. 488.

[92] *See About the Duke Endowment*, THE DUKE ENDOWMENT, https://www.dukeendowment.org/about (last visited July 31, 2023).

[93] *Amended and Restated Articles of Incorporation*, FORD FOUND. 4 (2016).

make them somewhat less immortal; and this seems to be a fate they want to avoid at all costs.

Of course, a charitable foundation does not *have* to be immortal. Some are designed to "sunset," that is, to spend all their money, like Charles Feeney with his personal wealth.[94] Apparently, this is something of a trend. As many as 9% of the existing foundations plan to "sunset" and go out of business.[95] The Rosenwald Fund, established by Julius Rosenwald in 1917, spent all its money and went out of business by 1948.[96] Indeed, the Gates Foundation, the grandest pile of money of all (at this time), announced in 2022 that it would end its run after another twenty-five years.[97] Despite these instances, most foundations (90%) are still free to enjoy immortal life.[98] Article V of the charter of the Ford Foundation states this explicitly: "This being a benevolent corporation, its term is unlimited and in perpetuity."[99]

The big foundations for the most part have very broad mandates. The Ford Foundation, for example, was established for "scientific, educational, and charitable purposes."[100] The Lilly Endowment, another one of the giants, established in 1937, is dedicated to the "promotion and support of religious, educational or charitable

[94] On Julius Rosenwald, a major philanthropist who argued strongly against the creation of gifts in perpetuity, see MADOFF, *supra* note 64, at 104–05.

[95] *Id.* at 108.

[96] *Id.* at 105–06.

[97] *See* Giacomo Tognini, *Exclusive: Bill Gates Reveals The Bill & Melinda Gates Foundation Aims To Run For Just 25 More Years*, FORBES (Sept. 23, 2022, 4:13PM), https://www.forbes.com/sites/giacomotognini/2022/09/23/exclusive-bill-gates-reveals-the-bill—melinda-gates-foundation-aims-to-run-for-just-25-more-years/?sh=524c235c452f.

[98] *See* Deanne Stone, *Alternative to Perpetuity: A Conversation Every Foundation Should Have*, NAT. CTR. FOR FAM. PHIL. (2005).

[99] *Amended and Restated Articles of Incorporation*, FORD FOUND. 3 (2016).

[100] *Id.* at 4.

purposes."[101] The Rockefeller Foundation, according to its legislative charter, has the awesome goal of furthering the "well-being of mankind throughout the world."[102] It would be hard to be more general than that.[103] But there are many small, niche foundations. The Tall Clubs International Foundation, Inc., as its name suggests, was set up for the benefit of tall people.[104] It gives out scholarship money, but only to women who are more than 5'10" and men who are over 6'2".[105] The scholarships are small: no more than $1,000, but money is money.[106] The Give Back Yoga Foundation will supply free yoga mats to yoga teachers and therapists; it has other activities, including a Prison Yoga Project.[107]

Charitable foundations are more than a century old; charitable trusts (trusts established by will or some other document) and similar arrangements are even older. We mentioned the plan Benjamin Franklin set up in his will. The plan lasted two centuries—and even longer, in a way; when the arrangement finally ended, Philadelphia money was still on hand. After some wrangling and discussion, the money went to community charitable organizations.[108]

Charitable trusts and foundations were not always as common as they are now; nor were they so well accepted.

[101] LILLY ENDOWMENT, INC., https://lillyendowment.org/ (last visited July 6, 2023).

[102] Rockefeller Foundation Charter, 1913 N.Y. Laws ch. 488.

[103] *Id.* The Foundation was authorized in the statute to use, as means to that end, "research, publication, [and] the establishment and maintenance of charitable, benevolent, religious, missionary, and public educational activities, agencies, and institutions."

[104] *See Tall Clubs International Foundation, Inc.*, TALL.ORG, https://www.tall.org/tci-foundation.html (last visited July 30, 2023).

[105] *Id.*

[106] *Id.*

[107] GIVE BACK YOGA, https://givebackyoga.org (last visited July 6, 2023).

[108] MEYER, *supra* note 40, at 244–47.

They have had, in general, a somewhat tangled history.[109] As we mentioned, they once bore something of the odor of feudalism, not to mention a certain amount of prejudice against the Catholic church, and perhaps against the dead hand of churches in general. In the first part of the nineteenth century, it was an open question whether charitable trusts were valid at all in the United States. In 1844, the issue was litigated in a notable case, *Vidal v. Girard's Executors*.[110] Stephen Girard, who died in 1831, was one of the richest men in the United States.[111] He was a widower, and childless. In his will, he directed his money to be used to establish (on land he owned) a "permanent college."[112] This was not a "college" in the modern sense of the world, but a private elementary school. It was for the benefit of "poor white male orphans, between the ages of six and ten;" orphans born in Philadelphia were preferred, then those from New York City; next in line were orphans from New Orleans.[113] The orphans would live in the College until they were between fourteen and eighteen years old; at that point they were to be bound out as "apprentices" in some "suitable occupations."[114] The College would carry Girard's name; and it would last (he hoped) forever.

Forever is a very long time; and Girard's passion for this kind of immortality clashed with another of his passions: micromanagement. The will specified "in minute detail" how the College was to run, and the courses on offer: the students could learn French and Spanish; Latin and Greek were allowed, but "not recommend[ed]."[115] Girard even provided

[109] On the history in general, see FRIEDMAN, *supra* note 78, at 145–52.

[110] 43 U.S. 127 (1844).

[111] *Id.* at 128.

[112] *Id.* at 130.

[113] *Id.* at 131.

[114] *Id.* at 132.

[115] *Id.*

details about the construction of the College buildings: the main building was to be three stories high, and each story was to measure "fifteen feet high in the clear from the floor to the cornice."[116] The orphans in the College were to wear "plain but decent apparel," and were to eat "plain but wholesome" food.[117] The exact menu, fortunately, was not specified in the will.

Girard, as we said, had no children; but he did have nieces and nephews who were hungry for a slice of his vast fortune. They went to court to try to break the will.[118] They raised a number of arguments. Most notably, they claimed the city of Philadelphia lacked power to take and hold property in trust.[119] They also claimed that nothing in Pennsylvania law allowed charitable trusts at all.[120] Another point: Girard had specifically forbidden the College from hiring clergymen; clergymen were not even allowed to visit the College since Girard was anxious to protect the "tender minds of the orphans" and keep them safe from the "excitement" of "sectarian controversy."[121] This ban, the plaintiffs argued, violated the public policy of the state.[122] But the Supreme Court, in an opinion by Justice Joseph Story, brushed aside Girard's frosty view of the clergy.[123] Yes, clergymen were banned from the school, and were not to teach there, but this was not necessarily a rejection of religion: lay teachers could teach morals and religion, after all. The court upheld the will and its provisions in every

[116] *Id.* at 130.

[117] FRIEDMAN, *supra* note 78, at 147.

[118] *Vidal*, 43 U.S. at 127.

[119] *Id.*

[120] *Id.*

[121] *Id.* at 133.

[122] *Id.* at 135.

[123] *Id.* at 186–87.

respect.[124] Most significantly, the Court held that charitable trusts were valid in Pennsylvania.[125]

But that was Pennsylvania: other states continued to be suspicious of such trusts. New York was a prominent example. The law in New York was not entirely clear; but charitable trusts and foundations were definitely under a cloud in that state and in a number of others.[126] In hindsight, a change in the direction of the Pennsylvania situation seemed inevitable; but that is often the case with hindsight. New York did join the parade eventually. The will of Samuel Tilden, another man with a plan who was rich and childless, proved to be a turning point. Tilden had been the Democratic candidate for President in 1876.[127] But a funny thing happened on his way to the White House. The election was close; and Tilden won the popular vote.[128] In the peculiar American system, that is not enough; the electoral college vote is what counts. But the electoral college was close to a deadlock.[129] This was, in other words, a contested election. In the end, the Republican, Rutherford Hayes, won the prize, though in a rather dubious way.[130] Tilden went back to his career in New York; when he died, he left part of his very large estate in trust to establish a "free library" in New York City.[131] Tilden was a lawyer, and he was well aware that charitable trusts were under a legal cloud in New York. He had devised a plan which (he thought) would get around the

[124] *Id.*

[125] *Id.* at 201.

[126] FRIEDMAN, *supra* note 78, at 147; Stanley N. Katz et al., *Legal Change and Legal Autonomy: Charitable Trusts in New York, 1777-1893*, 3 L. & HIST. REV. 51 (1985).

[127] *See* Richard White, *The Republic for Which it Stands: The United States During Reconstruction and the Gilded Age, 1865-1896*, 328–33 (2017).

[128] *Id.*

[129] *Id.*

[130] *Id.* at 333.

[131] Tilden v. Green, 28 N.E. 880 (N.Y. 1891).

problem. But it turned out that he was wrong. The New York courts struck down the Tilden trust in 1891 and handed the money over to his relatives.[132]

The failure of the Tilden trust was not, however, a popular result. Money that could have gone to the public, money that could have financed a free library in New York City, passed into the clammy hands of Tilden's relatives. The legislature took notice. In 1893, legislation finally made charitable trusts fully legitimate.[133] No state today has any problem with charitable trusts and foundations. The dead hand wins out. Nothing stands in the way of vicarious immortality: so long as a charitable trust is in the public interest, it can go on forever. And the concept of "public interest" is quite broadly defined.

V. CY PRES

Peter Thellusson, Stephen Girard, and the founders of charitable foundations, whatever their differences, shared a dream of vicarious immortality; the real thing, after all, was beyond their power, despite all their money. Obstacles to charitable foundations were gone by the twentieth century; and the law had become (generally speaking) extremely friendly to these institutions. Not only were they legal, they had the right to go on forever.

But it is not easy to go on forever. Forever is a dark and unknown land. A trust can start out one way—as perfectly legal and proper, and perfectly feasible—and then, as the years roll on, it may well become illegal, or impossible to carry out, for one reason or another. What happens then? The trust can simply end; a court could recognize that the original plan cannot go on, declare it dead, and give its assets

[132] *Id.*; *see also* James Barr Ames, *The Failure of the Tilden Trust*, 5 HARV. L. REV. 390 (1892). In the end, New York City got its library, because some of the heirs entered into a settlement agreement. The trust had enough cash which, together with some other sources, made the library possible.

[133] 1893 N.Y. Laws ch. 701.

back to the donor, or the donor's family, or the donor's representatives. But the older the trust, the less this makes sense. Generations might have gone by. The Franklin trust was challenged when it had already lasted a full century. Yes, the money could be given to Franklin's descendants, but what would be the point of that?

Modern law tends to take a different approach, a more sensible approach. The trust will be saved, almost always, by invoking a handy doctrine, *cy pres*. These words, originally law-French, mean "so close." The idea is simple: a court will modify the trust, getting rid of the legal or practical obstacle, and do it in a way that comes as close as possible to fulfilling the original purpose of the trust.

Consider the case of *Jackson v. Phillips*, decided in Massachusetts in 1867.[134] Francis Jackson died in 1861.[135] In his will, he left $10,000 to trustees to pay for "speeches, lectures, and such other means," which could create "a public sentiment that will put an end to negro slavery in this country."[136] He also left to the same trustees $2,000, in trust, to be used "for the benefit of fugitive slaves."[137] The problem was that, after Jackson died, and the Civil War ended, slavery was abolished. There were no more "fugitive slaves." There were no more slaves at all. What was to become of the trust? Arguably, the "immediate purpose" of the testator had already been "fully accomplished." Should the money go back to Jackson's family? But the court refused to do this. Instead, the court applied *cy pres*: the matter was turned over to a master who recommended giving the money to the New England branch of the Freedmen's Union Commission; the money would be used to "promot[e] the education, support, and interests generally of the freedmen (late slaves) in the

[134] 96 Mass. 539 (1867).

[135] *Id.* at 541.

[136] *Id.*

[137] *Id.*

. . . Union."[138] So, although the original plan was now impossible (or at least obsolete), the money was diverted to a cause close to that original purpose—at any rate, close enough—and presumably more in line with what Jackson would have wanted.

Admission to Stephen Girard's College, as I mentioned, was restricted to "poor white male orphans, between the ages of six and ten."[139] Nobody, apparently, considered this a problem—at the time. The *Vidal* case, which upheld the trust, never even mentioned this issue.[140] But in the twentieth century it became indeed an issue. In the civil rights era, this restriction was clearly intolerable—at least with regard to race, if not with regard to gender. In 1957, the state of Pennsylvania brought an action, on behalf of black applicants, demanding that Philadelphia end its policy of admitting only white boys to Girard College.[141] In a brief, per curiam decision, the United States Supreme Court sided with the state.[142] Philadelphia could not discriminate on the basis of race: this provision of the trust was illegal, and something would have to be done.[143] Unfortunately, this case did not end the matter. The public trustees of Girard College

[138] *Id.* at 599. The case is famous because it was one of the clearest and earliest decisions applying cy pres to private trusts in the United States. The will also left money to trustees to be used "to secure the passage of laws granting women, whether married or unmarried, the right to vote; to hold office; to hold, manage and devise property; and all other civil rights enjoyed by men." *Id.* at 571. Here the testator, alas, was too far ahead of his time. The "purpose of overthrowing or changing" laws on women's rights was not, in the eyes of the court, truly a valid charitable object. This gift was therefore "inoperative and void." *Id.*

[139] Vidal v. Girard's Executors, 43 U.S. 127 (1844).

[140] *See id.*

[141] Pennsylvania v. Bd. of Dirs. of the City Trs. of the City of Phila., 353 U. S. 230 (1957).

[142] *See id.* at 231.

[143] *Id.*

bowed out, replaced by private trustees.[144] Presumably, these trustees could continue to discriminate. But this change simply led to further lawsuits. The end came in 1968.[145] The restrictions were removed. Today, half of the students are women; and 90% of the students are Black.[146] The College, however, is still very much alive—more than a century after Girard went to his grave. But it is clearly a very different place.

The spirit of *cy pres* lay behind these developments. Not all American courts were friendly toward this (originally English) doctrine, despite *Jackson v. Phillips*. Only in the twentieth century did courts accept the doctrine, almost universally, at least in principle.[147] It was a sign of general good will toward charitable trusts and foundations. The alternative—throwing the whole thing out and giving the money back—seemed less and less appealing. So long as the court sees a "general charitable intent," they refuse to take this drastic step. And courts are usually eager to find such an intent, even when the original donor very likely would be whirling in his grave.[148] Do we know, or care, what Stephen

[144] *See Girard College- Stephen Girard's Legacy*, WIKIPEDIA, https://en.wikipedia.org/wiki/Girard_College (last visited July 31, 2023).

[145] *Id.*

[146] *Id.*

[147] Edith L. Fisch, *The Cy Pres Doctrine and Changing Philosophies*, 51 MICH. L. REV. 375, 378–79 (1953).

[148] One of the rare exceptions to this general trend was a Supreme Court case, Evans v. Abney, 396 U.S. 435 (1970). Senator Bacon of Georgia, in a 1911 will, set up a trust to fund a park in Macon, Georgia, for the exclusive use of white people, "perpetually;" he expressed only "the kindest feeling" for non-whites, but felt that the races "should be forever separate." *Id.* at 437. The Supreme Court, in a previous case, had held that this provision was now illegal. A public park could not be restricted to white people. The Georgia courts then held that Bacon had no general charitable intent; that "racial separation was an inseparable part" of his intent. *Id.* at 442. The whole scheme therefore had to fail. The United State Supreme Court refused to disturb this holding. So much for the park in Macon, Georgia.

I doubt if the Supreme Court in the 21st century, even though it is very

Girard would think about Black women in his College?

Cy pres, after all, is a doctrine that recognizes change. When Girard died, there were slaves in half of the states. Women did not vote or hold office; and both racial and gender equality were not on the legal agenda. But times change, the world changes; and law changes with the culture. In the civil rights era, racial discrimination is very much on the agenda. What was legal once has become legally impossible. In general, donors can make their trusts or foundations immortal; but they cannot make immortal provisions and lay down immortal conditions. The more specific these conditions, they more they might face *cy pres* as time goes on. But the trusts will survive, so long as courts can sniff out a "general charitable purpose." This allows them to unsheathe the sword of *cy pres* and modify the trust into something more palatable.

The reformed trust, of course, is supposed to be as close as possible to the donor's original purpose and plan. But what would this be? The courts are simply guessing. They have no way of knowing what would be as close as possible to the original purpose and plan. Do they even care? The mind-set of one era cannot be projected into the future. Stephen Girard wanted to help out certain boys: white male orphans. Today, almost none of the students at his college fit this description. If Girard, like the Sleeper in Wells' novel, came back to life, he might be horrified—at first. Possibly, once he got used to contemporary life, once we explained

conservative on most issues, would decide the case the same way. The question is not: was Senator Bacon a segregationist? Of course he was. He said so. Nor is it sensible to ask, what would he think of his segregated park in 1970? Would he agree to open it up to all races? How would we know? If we resurrected Senator Bacon, and explained the changes that had taken place in constitutional law—and in society—would he still want a segregated park? Georgia hotels and restaurants are no longer segregated: why should the park be restricted to white people? Of course, asking the question this way makes no sense. The real question is: how long does Senator Bacon have the right to project his wishes into the future? Nice to have a public park in Macon, and thank you, Senator Bacon: but at what point do Senator Bacon's precise plans stop mattering? At what point does the park enter the public domain?

about cellphones and air conditioning, once he learned about what happened in America since he died, once we gave him a crash course in modern constitutional law, he might change his ghostly mind, and go with the program, so to speak. Moreover: what choice do we have? Would Stephen Girard really prefer the alternative: putting an end to Girard College, expelling the students, selling off the assets, and giving the money to remote descendants of distant relatives? In any event, this is all mere speculation. We can't bring him back to life. Girard College can survive—its buildings can still stand; it can keep on functioning. But in an important way, it has had to move on and go with the historical flow.

George W. Clayton died in 1899, in Denver.[149] His will was obviously influenced by Girard's. Clayton left money in trust to the city and county of Denver to be used to establish the George W. Clayton College, for "poor white male orphans . . . between the ages of six, and ten years, born of reputable parents," with preference to locals.[150] In 1954, the trustees, who had amassed a "sizable accretion," went to court: they wanted permission to diversify the student body.[151] The trial court refused to apply *cy pres* and turned the trustees down.[152] The Colorado Supreme Court, in 1956, affirmed.[153] Clayton's restrictions were "conditions" and not mere "preferences." They would remain.

It is easy to guess what happened later on. It took a mere thirteen years for the Colorado Supreme Court to change its mind. In 1969, the Court held that the College had to admit children of any race or gender.[154] Later, the emphasis shifted

[149] Moore v. City & Cnty. of Denver, 133 Colo. 190, 191 (1956).

[150] *Id.* at 192.

[151] *Id.*

[152] *Id.*

[153] *Id.* at 195.

[154] Dunbar v. Bd. of Trs., 461 P.2d 28, 29 (Colo. 1969).

to "early childhood education and development."[155] The Denver campus of what used to be Clayton College is located, appropriately, on Martin Luther King, Jr., Boulevard.[156] The Clayton fund, on its website, admits its exclusionary past and now stresses, with "humility," its inclusive nature.[157] Clayton, of course, has been dead for more than a century. Would he approve of these changes? How could we possibly tell?

Milton Hershey and his wife—they had made a fortune from chocolate—endowed an orphanage in the early twentieth century for "poor white male orphans," a group which, as we have seen, seems to touch the hearts of some very rich people.[158] Orphanages have become basically obsolete; Hershey's orphanage, no surprise, morphed into a residential school, and the race and gender restrictions vanished.[159] So much for poor white orphan boys. In a New Jersey case from 1961, C. Edward McKinney, a rich and grumpy man, left money to Amherst College, to be used as a scholarship loan fund "for deserving American born, Protestant, Gentile boys of good moral repute, not given to gambling, smoking, drinking or similar acts" (as he explained, if these boys had money enough for "the waste of smoking" they didn't need his help).[160]

Amherst refused to accept the money—at least in this form. The school's charter provided that no student could be excluded "on account of . . . religious opinions."[161] The school

[155] *The Innovation Hub*, CLAYTON EARLY LEARNING, https://www.claytonearlylearning.org/who-we-are/innovation-hub.html (last visited July 6, 2023).

[156] *Id.*

[157] *Id.*

[158] MADOFF, *supra* note 64, at 100.

[159] *Id.*

[160] Howard Savings. Inst. v. Peep, 34 N.J. 494, 497 (1961).

[161] *Id.* at 498.

could have added that it would be hard to find these male paragons of virtue:[162] "good moral repute" was not defined, but probably meant that McKinney expected these young men to be virgins, another disappearing category. In any event, since Amherst could not run it according to its terms, the trust, even if it was technically legal, could not be carried out without some sort of change. Amherst wanted the money, of course; and they invoked the *cy pres* doctrine.[163] McKinney's relatives also wanted the money. They argued that the old man's "particular, unitary and inseparable purpose" was to benefit Protestant students.[164] Were they right? Perhaps. After all, they knew the old man, and the judges didn't. Amherst was running a certain amount of risk: the court could have used *cy pres* to transfer the trust to some conservative, religious college, which would be willing to carry out McKinney's plan.[165] But this risk was quite small. The court decided, first, that McKinney had had a "general charitable intent," and, secondly, that he had a special desire to help out Amherst College.[166] They upheld the trust and removed the offensive terms.[167]

Living persons can be as specific and idiosyncratic as they want. Also, in many ways, as bigoted as they want (subject to civil rights laws, of course). The richer you are, the more you can indulge your whims and crochets. This is harder to do once you are dead. During his lifetime, McKinney could have doled out scholarship money to

[162] Indeed, the next-of-kin, suing to overturn the trust made this very point: they asked the court to take judicial notice of the "fact that in light of contemporary social conditions and mores, few if any Amherst students could comply with all of the trust requirements." *Id.* at 503.

[163] *Id.* at 502.

[164] *Id.* at 504.

[165] In *Howard Savings Inst. v. Peep*, a dissenting judge did suggest doing this: that is, removing Amherst in favor of a trustee that would carry out the terms of the will as they were—no doubt a religious college. *Id.* at 511.

[166] *Id.*

[167] *Id.* at 510–11.

whatever Protestant boys met his exacting standards. And Stephen Girard, too, in his lifetime, could have built his College any way he wanted: he could have micromanaged it, chosen the orphans he wanted to let in; he could bar the doors to clergymen; he could insist on a certain curriculum; could choose the food on the menu—there was no one to say no. After his death this became—eventually—harder. Mostly Girard got his way—until the twentieth century at least. For decades, George W. Clayton also got his way—but not forever.

This is the fate of idiosyncratic founders. Eventually, they lose. Albert Barnes was another famous example. Barnes, who died in 1951, owned a priceless collection of paintings, including 181 Renoirs, 69 Cezannes, 59 Matisses, and dozens of other masterpieces, including paintings by Van Gogh, Titian, El Greco, and Goya.[168] The Barnes Foundation, in Marion, Pennsylvania, was built to house this collection.[169] Barnes prescribed some fairly eccentric restrictions: the general public could look at these works only on Saturdays, from September to June (no entry whatsoever in July and August).[170] The paintings were to remain exactly where they were, and as they were. They were never to be sold or loaned out; there would be no entrance fee and no "receptions, dinners, banquets" to be held on site.[171] His directions were scrupulously followed—at least for a while. Then came financial difficulties, and a swarm of lawsuits. Were the terms of the Barnes Foundation really in the public interest, or were they so severe that they no longer served

[168] *The New Barnes Opens in Philadelphia*, ANTIQUES & THE ARTS WEEKLY (June 12, 2012), https://www.antiquesandthearts.com/the-new-barnes-opens-in-philidelphia/.

[169] *See* Chris Abbinante, *Protecting 'Donor Intent" in Charitable Foundations: Wayward Trusteeship and the Barnes Foundatio*n, 143 U. PA. L. REV. 665, 670 (1997).

[170] *Id.* at 671 n.34.

[171] *Id.* at 671 n.41.

any purpose? If so, should these conditions be superseded? In the event, they *were* superseded.[172] Today, the Barnes collection is no longer in Marion. It is now in the heart of Philadelphia. It is also now open to the public. Some of the paintings have gone on tour. In short, virtually none of the quirky wishes of Albert Barnes has survived. I think we can be quite sure Barnes would never have approved of these changes.

Cy pres is a powerful and useful doctrine. It has been used in a wide range of cases. It has been particularly useful in getting rid of discriminatory provisions in older trusts. It is, arguably, something of a legal fiction: probably none of the changes courts impose are really "as close as possible" to the original plan. The decisions can seem discretionary and subjective. But there is a social reality that the formal doctrine does not reflect (or reflects only in a dim, pale way), a kind of hidden meaning. It is something along these lines: after a certain amount of time—there is no way of saying exactly *how* long this might be—the original intent no longer matters; the original personality no longer matters; the original scheme no longer matters—or at least does not matter decisively. For the Girard Trust, the Barnes Foundation, and for Clayton College, what the founders thought, what they would and would not do if they came back to life, has become irrelevant. Their names can remain in place, stuck on like a label that can never be removed, on their trusts and foundations, their parks, their buildings, their surviving institutions. But in a real sense, all of these institutions—everything except the name—eventually pass into the public domain. They come to reflect a situation and a structure which the culture and the economy dictate; and which the law, therefore, follows.

The big foundations, today, do not face the problem that came to bedevil Girard College, or which plagued the Barnes Foundation. Statements of purpose and "guiding principles"

[172] *Id.* at 677.

in the charters and founding documents tend to be extremely vague and general. These foundations are unlikely to need *cy pres* or to face litigation that threatens to end them and turn the money back to the donor's relatives. But their broad mandate carries with it another set of difficulties—difficulties for the donors—at any rate. They can have their immortality; but just as it was for Girard or Barnes, it can turn into a dim, ghostly form of after-life. If Henry Ford came back from the grave, what would he think of the goings-on at the Ford Foundation? Ford was a notorious and rabid anti-Semite;[173] but the Ford Foundation has given millions of dollars to such organizations as Jews United for Justice and American Jewish World Service, Inc.[174] He might be as disappointed as any of the victims (as it were) of *cy pres*. Would Olivia Sage appreciate the work of the Russell Sage Foundation? Would the Rockefellers be pleased with the spending plans of the various Rockefeller foundations?

Creators of foundations are typically very rich. They are not usually saints, to put it mildly. Founders include a clutch of robber barons, wolves of Wall Street, and other dubious characters. Typically, one imagines, their foundations end up, years later, doling out money for causes the donors might actually hate. In the early years, the donor or the family can dominate the board of trustees. But family domination is unlikely to last more than a generation or two. A donor can make sure that the foundation sticks to its original mandate by cutting short its life. This was done by John Olin; he wanted to make sure his money was used for conservative causes, and did not drift into less pure hands; hence he

[173] *See generally* VICTORIA SAKER WOESTE, HENRY FORD'S WAR ON JEWS, AND THE LEGAL BATTLE AGAINST HATE SPEECH (2012).

[174] *Annual Report*, AM. JEWISH WORLD SERV. 28 (2022); *Grantee: Jews United for Justice*, FORD FOUND., https://www.fordfoundation.org/work/our-grants/awarded-grants/awarded-grant/core-support-for-the-collaborative-for-jewish-organizing-to-organize-in-19-plus-states-to-work-in-pa/143825, (last visited July 6, 2023).

provided for it to sunset within a generation of his death.[175] But this is exceptional: most foundations are less strictly ideological and are designed to be perpetual. So, no surprise, in the end, the money falls into the hands of a class of people very different from the donors: professional managers, men and women who specialize in running foundations. They have a different agenda. But wasn't this inevitable? In any event, although you can, in fact, have your vicarious immortality, it comes with a price tag. Your immortality may change form over time. Your name will live on: but will your ideology survive? Your whims, your prejudices?

Stephen Girard was looking for his own brand of immortality; so was Benjamin Franklin, in the eighteenth century. Franklin, we are told, had "an extreme desire to see the state of America" a century after his death; it would be wonderful, he felt, if he could be "brought back to life by the warmth of the sun of my dear homeland."[176] Franklin was a remarkable man. He would no doubt have eagerly embraced cryogenics, if there was such a thing in his day. The donors of foundations might have felt, like Franklin, that it would be great to see how the world turned out, centuries after their death. But this is not an option. Presumably, too, they would want to project their wishes and their ideologies into the future. But they face a dilemma. They can choose as their model either Albert Barnes or the Ford Foundation: micromanagement or broad statements of principle. In either case, they risk losing, as time goes on, key aspects of the very immortality they want.

Presumably, donors expect their fortunes to serve society, and to do good in the world. Their foundations have to be "charitable," in the legal sense of the word; otherwise, they would have lost the right to go on in perpetuity (at least until now). Moreover, unless trusts and foundations qualify

[175] *Goal Reached, Donor on Right Closes Up Shop*, N.Y. TIMES, May 29, 2005, at A1.

[176] MEYER, *supra* note 40, at 254.

as charitable, they face the sting of taxation. Rich donors, generally speaking, hate taxes, especially estate taxes. Gifts to foundations escape such taxes. Stephen Girard of course died long before there was any such thing as an estate tax. To Henry Ford's family, however, death taxes were a serious worry. Ford's huge estate faced an enormous tax burden. Of course, the estate could easily raise the money; they could do this by selling off shares in the company. But these shares were tightly held by members of Ford's family. Selling these shares might mean giving up control. To avoid this, the family created a class of non-voting stock.[177] This stock would go to the Ford Foundation.[178] Voting stock would stay in the family.[179] If great quantities of stock were left to the Ford Foundation, the taxable estate would be lowered to the point where the family could manage the tax burden without giving up family control. And, of course, the family could also control the Foundation. Family members would choose the Board of Trustees, and family members could also serve on the Board.

This tax issue was a major factor in the birth of the Ford Foundation, no question. The tax-free nature of gifts (by will or otherwise) to charitable foundations has surely been a factor in the story of other foundations as well. But it is almost certainly not the only factor. The Fords could have gotten the same tax result if they simply left the bulk of Henry Ford's estate to the Red Cross, or Harvard University, or the Detroit Symphony Orchestra. But in that case, there would be no foundation carrying on the work the donors wanted and carrying the Ford name through all eternity.

No doubt each major foundation has its own creation saga: a story that reflects some motive, some urge, some ideology, some impulse in the mind of donors and their

[177] *See The Ford Family Sells*, TIME: CORPORATIONS, Vol. LXVI No. 20 (Nov. 14, 1955).

[178] *Id.*

[179] *Id.*

families. Foundations differ in organization, structure, and goal. Some are interested only in medical research. Some are intensely local. Some devote a good deal of attention to churches and religion. But all of them, presumably, act in the interests of the public and not in some personal or selfish interest. Much of what they do is uncontroversial. Who could argue against a fund which supports work on the causes and cures of cancer; or which give a lift to chamber music and the arts; or which works to strengthen higher or lower education or both; or which extends a helping hand to the poor. Nonetheless, foundations have been, at times, controversial. Their normal life cycle makes them vulnerable to attack, mostly from the right side of the political spectrum. Rich, conservative people establish these institutions; but they do not end up running them—if not right away then eventually. In 1952, during one of many spasms of right-wing paranoia, the House of Representatives launched an investigation of foundations which were suspected of "un-American activities and subversive activities."[180] This failed to uncover any such goings-on. Committee work continued, however, under the leadership of Representative Brazilla Carroll Reece, of Tennessee. Reece was convinced the foundations were fostering "collectivism."[181] In his view, the Ford Foundation, believe it or not, was a "diabolical conspiracy" out to communize the country.[182] Moscow, in his view, was pulling strings to "penetrate" various foundations with American puppets.[183]

Some of Reece's witnesses eagerly supported this hysteria. The final report was more balanced, though there were still some mutterings about the danger of "subversion." No doubt all this led to a certain nervousness at the

[180] On the background, see Harry D. Gideonse, *A Congressional Committee's Investigation of the Foundations*, 25 J. HIGHER EDUC., 457–63 (1954).

[181] FRIEDMAN, *supra* note 78, at 151–52.

[182] *Id.*

[183] *Id.*

headquarters of foundations, but in the end nothing much came of these congressional outbursts. Foundation work was bound to seem suspicious to right-wing members of Congress. These were the sort of people to whom sociology and socialism seemed much the same thing; who loathed the New Deal; and who distrusted universities, their faculties, and the things that they taught. A more serious investigation, in the 1960's, was animated by concern that the ultra-rich were dominating foundations, while using them to gain huge tax breaks.[184] Some modest reforms were enacted in 1969.[185] Foundations were not allowed to sit tight, enjoying their tax-free status, growing fatter and fatter like a Thellusson trust; rather, they had to spend each year at least 5% of the market value of their principal for charitable purposes. There were and are simple ways to get around this requirement;[186] still, it may have had some effect. It also may have led, at times, to a certain modest amount of invasion of principal. But it made no real dent on the size of foundations and probably did nothing to slow the growth of this sector of the economy. No billionaire, one imagines, decided not to create a foundation, because of the law of 1969.

It is easy to sneer at men like Reece. That the Ford Foundation or the Gates Foundation or any of the major foundations are part of some left-wing plot is, of course, ridiculous. But the major foundations do embody a certain paradox, as we have already mentioned. The free market made the donors rich; but the free market does not govern the behavior of foundations. They have no stockholders and are not supposed to make profits. As long ago as 1926, it was pointed out as "ironical" that the "crowning achievement, the ultimate justification, of the fortune-builder," would be so

[184] *Id.*

[185] Tax Reform Act of 1969, 83 Stat. 487; *see also* Philip Hackney, *The 1969 Tax Reform Act and Charities: Fifty Years Later*, 17 PITT. TAX REV. 235 (2020).

[186] *See* Ray D. Madoff, *The Five Percent Fig Leaf*, 17 PITT. TAX REV. 341 (2020).

different from the "standards which have conditioned his own rise to power."[187]

The foundations are not wild left-wing institutions, whatever the Reeces of the world might imagine. But staffs and leaders of foundations are drawn, on the whole, from the center-left. How could it be otherwise? The dead hand weakens over time. Foundation policies ebb and flow. There are, to be sure, some prominent right-wing foundations. But most managers and their staffs can't be assigned to that category. The Ford Foundation is almost a century old. The Ford family no longer controls it or the company itself, for that matter. The Foundation long ago sold off all of its company stock. Family members are no longer on the Board of Trustees. Ford's descendants might well be proud of the Foundation and the work that it does. But they do not control it in any way. Loss of control may be the price donors pay for their share of vicarious immortality.

VI. BURY YOUR DEAD

Only rich people can afford to set up charitable foundations. Only rich people can give money to put up campus buildings, symphony halls, and art museums which will carry their name down through the generations. But even ordinary people have immortal longings. As I pointed out, it is common for people to specify how and where they want to be buried, or whether they want to be cremated. Contracts with cemeteries for "perpetual care" of graves are common. Dead people are really dead; but in a way, they do not seem quite so dead (at least to their families) when there is a grave in a certain spot; when there is a headstone or monument, with suitable sentiments chiseled into the stone; when their graves can be visited; and when the cemetery has an obligation to keep the grave site cleared of weeds, and

[187] *Foundations and Private Enterprise*, 47 NEW REPUBLIC 210, 216–17 (1926).

generally treated with respect. A Pennsylvania law of 1891, for example, authorized the "disposition of property" to maintain and care for a grave or monument, even though this disposition was made perpetual.[188]

Of course, "perpetual care" is not and cannot be perpetual. Money paid to cemeteries, years before, to keep up graves fails to keep up with costs. Cemeteries belong in a way to the dead; but only if living people have paid or still pay for what it costs to keep them going. As time goes on, survivors lose interest; the flowers wilt on the gravesite; soon no one brings flowers; no visitors come; weeds grow around the grave; the lettering on tombstones fades into oblivion. Kings and queens and pharaohs can construct elaborate monuments to themselves that will last through the ages. Generals and poets and prime ministers are memorialized in Westminster Abbey. Most of us will leave no such monuments behind. Even old sepia photos, in albums, end up in flea markets. The past, for most of us, cannot last.

VII. MORE DEAD HANDS: THE RULE AGAINST PERPETUITIES

Charitable trusts and foundations have a beginning: a charter, a statute, a basic document. A beginning, but no obvious end. They can be, and usually are, designed to be perpetual. Private trusts, family trusts, do not have this advantage. Or at least *did* not in the past. There were strict limits on their life span. For 200 years or so, the so-called rule against perpetuities set that limit. The underlying idea was fairly simple, but the rule, alas, was anything but simple. It was arcane and complex—and in its extreme forms, not only maddening, but completely mad. Its ins and outs could drive poor students to distraction. It may have had this effect on some estate lawyers too.

The rule applied to "future interests"; it applied to rights (to income or principal) that would "vest," that is, become

[188] 1891 Pa. Laws 119.

certain, at some time in the future. Suppose a wealthy donor transfers money into a trust for his daughter. He instructs the trustee to pay the income from the trust to the daughter as long as she lives. When she dies, the money will go to her children—at least to children who outlive their mother. The interest of any grandchild, then, is contingent, rather than certain. It only "vests" when the daughter dies.

This is a common kind of arrangement. Legally, it presents no problem. But suppose the donor sets up a more complicated scheme. The trust is to go on past the daughter's lifetime, much longer in fact: until *her* children all die, let us say. How long can the trust last? How many generations? How many years? The rule against perpetuities gives the standard answer: the trust can last until twenty-one years after the death of "lives in being"; at that point it must vest or die. "Lives in being" means people who are alive at the time the trust was instituted, or, if the arrangement is embodied in a will, at the date of the testator's death. If it does not vest within twenty-one years from the date of death of the last "life in being," then it is no good; and the whole plan fails.

But who are these "lives in being?" These are either (1) living people the donor mentions specifically in a will or trust or (2) people whose existence is implied (a gift for the benefit of "grandchildren" implies the existence of children; all grandchildren have to be born within the lifetime of one or more of the donor's children).[189] The lives in being need not be relatives, though they usually are. In any event, the trust can last as long as any "lives in being" are actually alive; plus, another twenty-one years. Caleb, a millionaire, can transfer money into a trust, for the duration of the lives of his granddaughter Hepzibah, and his grandson Ezekiel, who,

[189] A minor caveat: one might need to add a few months, to accommodate a man's afterborn child, the child of a man whose wife or partner was pregnant when he died.

when he sets up his trust, are two-year-old twins. He can add on another twenty-one years. But that is the limit. In practice, the rule means that private trusts can last as long as eighty or ninety years, possibly even a century, depending of course on how long lives in being actually stay alive.[190]

So far, this is bad enough, though somewhat tricky. But the actual rule was more complicated. And it sprouted some really weird side-rules: rules that could trip up lawyers whose grasp on the rule was somewhat shaky. Legal scholarship gave some of these side-rules clever names, which made them easier to remember: the fertile octogenarian, the unborn widow, and the magic gravel pit.[191] These labels warned of treacherous pitfalls, which had to be avoided at all costs. A trust or will that fell into one of these gravel pits was doomed. This was because of another murderous side-rule: a trust arrangement was invalid as long as there was *any* chance that the plan could violate the rule, no matter how unlikely the chance, or even if there was no real chance (practically speaking) at all. If you set up a trust for the life of your son, and then for the life of his widow (not naming her), you may have fallen into the trap of the "unborn widow." Why? Your son's wife might die; he might then remarry (it happens); and the new wife might be a woman so much younger than your son, that she was not

[190] If someone sets up a trust in her will, income to go to children for life, then to grandchildren living at the time of her death and ending only when the youngest of these grandchildren reaches twenty-one, this trust does not violate the rule. Grandchildren have to be born (or conceived) within the lifetime of children. They are therefore implicitly lives in being. But if that same someone was to set up the identical trust while still alive, the trust would violate the rule. She might have more grandchildren afterwards, and these grandchildren do not qualify as lives in being. And this hypothetical afterborn grandchild might outlive all the actual grandchildren and go on for more than twenty-one years. Of course, this would usually be extremely unlikely, but no matter. The classical rule was iron-clad.

[191] *See generally* W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938). Leach did not actually use the phrase "the magic gravel pit;" he classified this situation under the bland heading of "administrative contingency."

even born at the time the trust was created. She was not, therefore, a "life in being"; and there is a chance (I would guess, one in a trillion) that the trust would last longer than any qualifying lives in being plus twenty-one years. The idea, of course, is ridiculous; yet this shadowy and unborn widow could smash a whole estate plan into nothingness. It did this, for example, in a Georgia case decided in 1989, to the intense annoyance of at least one law professor.[192] The rule, in its heyday, was utterly pitiless.[193]

[192] *See generally* Pound v. Shorter, 377 S.E.2d 854 (Ga. 1989). Elizabeth Shorter died in 1929; her will created a trust for her son, who was at the time unmarried. If he married, and his wife survived him, she would have a life interest; after that, the corpus would go to Shorter's nieces and nephews. The son married and died (childless) before his wife. No good, said the court; the plan violated the rule against perpetuities—a classic case of the unborn widow. The Georgia court refused to budge: the traditional rule "has been effective so far in Georgia," the court said—their evidence was that very few cases have been brought, and very few arrangements invalidated. This of course proves nothing. See the exasperated account by Verner V. Chaffin, *Georgia's Proposed Dynasty Trust: Giving the Dead Too Much Control*, 35 GA. L. REV. 1 (2000). Georgia did shortly afterwards adopt a modernized form of the rule against perpetuities, which eliminated the problem. Too late, of course, for the frustrated heirs in Pound v. Shorter.

[193] In the interesting (and fairly outrageous) case of Lucas v. Hamm, 56 Cal. 2d 583 (1961), disgruntled heirs brought a lawsuit against a lawyer, Hamm, whose carelessness in drawing up a will, they claimed, had cost them a tidy sum of money. The testator's will set up a trust; but assets would only flow into the trust five years "after the date upon which the order distributing the trust property to the trustee is made by the Court having jurisdiction over the probation of the will." *Id.* at 823. In other words, the trust would start only *after* the probate process ended. This seems okay: but wait! What if the probate process took 100 years or even longer? True, it seems absurdly unlikely that the process would take so long—so long, in fact, that everybody in the world would have died after the testator, plus 21 years more. This is ridiculous; but if you want to be a loyal follower of the rule against perpetuities, you have to admit this possibility is not absolutely excluded. Thus the trust violated the rule against perpetuities. It failed, and the plaintiffs never got their money. Hence the lawsuit against Hamm, the lawyer who fell into this trap.

Believe it or not, the California court refused to hold Hamm liable. They sympathized with the lawyer, rather than the clients. The law on the subject was "fraught with confusion," the court said. *Id.* Perhaps the judges remembered their own agonizing days in property class, trying to wrap their heads around the rule. The rule was such a terror that one could not honestly say that Hamm "failed to

Some of the subrules seem so wild and far-fetched that one wonders why and how they ever came into existence; and what kept them alive. They seem as if only a lunatic could have invented them rather than lawyers with wigs and robes and (presumably) brains. But often what seems pointless, legally speaking, does have something of a point. The virtue of these subrules was their "almost mathematical precision"; a good lawyer, reading a will or a trust, could tell with total certainty whether the rule had or had not been violated.[194] Women who are eighty or older cannot have children; but if a will says nothing about a woman's age, and we want this kind of certainty, we can either assume that all women are able to have children; or none of them. Arguably, the first assumption (they all can have children) on balance makes more sense and is more often realistic. The subrules can be defended (if you want to defend them) more or less along these lines.[195] So much for the subrules. But did the rule itself make sense? In a way it did. Its thrust was to limit the dead hand: to prevent people of wealth from projecting their influence far beyond their death. It was designed to limit family dynasties: to prevent rich owners of property from governing the use of their money long after death. Peter Thellusson was an extreme example of this kind of impulse; but even less extreme cases seemed to need some sort of boundary line.

The rule seemed like sound policy, at a time when the law was anxious to avoid "restraints on alienation": that is assets "tied up" and kept off the market. In the bubbling and growing capitalist economy, "restraints on alienation" seemed undesirable. This was the philosophy behind mortmain statutes and the idea that led to rules against charitable foundations. The concern might have made good sense at one time; but it gradually lost most of its relevance

use" the skill and prudence a lawyer would be expected to use. *Id.* Let the buyer of legal services beware.

[194] FRIEDMAN, *supra* note 78, at 129.

[195] *Id.* at 130.

in the nineteenth century. No one worried about land locked in the clutches of the dead hand, bottled up, shut out from the market economy. Indeed, this was never as much of an issue in the United States as it was in England. The rich in the United States were not land-rich: they were merchants, bankers, men of business. There was no "landed gentry" to speak of in the United States, with the possible (partial) exception of the plantation South. The rich might set up family trusts—and they did—but more and more these trusts gave the trustees power to sell assets, exchange assets, choose assets; to buy stocks and sell bonds, or vice versa; to sell shares in utility companies, and buy stocks in railroads or food companies; and so on.[196] There was, in short no "restraint on alienation" at all. Still, the rule against perpetuities survived. It survived to express a secondary goal: limiting the time the dead hand could have its own way. The reasons why are not entirely clear. Some vague mutation of individualism. A preference for self-made men (and the rare self-made woman). The rule expressed a certain disdain for unearned money, for inherited wealth, for men and women who clipped coupons, who lived off money somebody else had earned. A prejudice against dynasties of wealth. Some notion that the world belongs to the living. A trust can protect children and grandchildren against themselves; but it also limits them, prevents them from free use of capital.

The law ran along two parallel, and quite different, tracks. The rule against perpetuities expressed one goal. But the law of trusts, in general, expressed quite another goal: a strong tendency to coddle rich people and to allow them to decide, at death, and even afterward, what should be done with their money, who would inherit their assets, and in what form and under what conditions. The donor's intent would be treated as sacred. The two may seem inconsistent.

[196] Well-drafted wills and trusts gave trustees full discretion to control investments. There were default rules, of course, if the document failed to do this; and these rules were, at times, and in some states, fairly restrictive. On this point, see Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547 (1964).

But in a broader sense they are not. The law will give the dead hand a great deal of power. You can do what you want to be done, after death. You can choose burial or cremation. You can disinherit who you will, and grant money to whatever person or institution you favor. You can project these wishes into the future; you can bind your estate for years and years. But not forever. It has to loosen its grip, after a certain amount of time. That is the job of the rule against perpetuities: you can go so far and no further.

In an earlier essay, I drew a distinction between two kinds of trusts; I named one type a caretaker trust, and the other I called a dynastic trust.[197] A trust for your three-year-old daughter, to take care of her if you died, and lasting until she became an adult: that would be a caretaker trust. Or a trust for a brother who, unfortunately, is developmentally disabled and needs someone to take care of his financial and personal needs. A trust that bridges generations is an altogether different beast: a trust, for example, which pays income to your children, as long as they live; and then, after each child dies, to the children they left behind, during *their* lifetimes. This type is the dynastic trust. Dynastic trusts can come in different shapes and sizes. They can last more than one generation. Some can go on even longer. But they will fail altogether if they push up against the stone wall of the rule against perpetuities.

That was the limit: but within its limits, trust law dealt more and more kindly with dynastic trusts: with more and more respect for the donor's wishes. The "spendthrift trust" doctrine, for example, allowed donors to create trusts in which the beneficiary's rights were immune from creditors. A "spendthrift trust" has little or nothing to do with actual spendthrifts. It has everything to do with the integrity of the donor's original plan. If you set up a trust for Zachary, your nephew, giving him the right to income as long as he might live, Zachary would normally be able to sell or give away

[197] *Id.*

these future rights, either the right to the stream of income or to whatever rights to principal he enjoyed, but not if the trust was a spendthrift trust—which became both normal and ordinary. In a spendthrift trust, the original design, the donor's original plan, would be treated as if it was holy writ. Neither the principal, nor the income stream, can be reached by creditors. If the beneficiary ran off to Brazil, or some such place, he or she could sneer at the helpless creditors. If a beneficiary ran up huge gambling debts, Las Vegas would have to wait for each payment to go after the debtor. The children and grandchildren will have a more or less guaranteed income; but they will not have the power the donor had: the power to do whatever they want with the principal, the power to (say) finance a movie or a musical on Broadway, or to invest big in cryptocurrencies, or buy a Picasso; or the power to fritter it away; or, for that matter, to give away their rights to lovers, friends, partners, or charities.[198]

Why this is true—this sweet solicitude for what rich, dead people want—is not immediately obvious. But that it *is* the case seems clear. The law came to embody a kind of equilibrium. On the one side, the rule against perpetuities put a time limit on the dead hand. On the other side, within that limit, trust law allowed wealthy donors to project their wishes beyond the grave. This of course redounded to the benefit of coupon-clippers and those who got fat on inherited wealth. But it preserved the donor's plan, after he was dead. It was, in a way, a delicate balance between those who made the money and those who enjoyed the benefits of that money.

In a well-known Massachusetts case, *Claflin v. Claflin*, Wilbur Claflin, the testator, put money in trust for his son, Adalbert.[199] Adalbert would enjoy whatever income the trust

[198] *Id.* at 575–77; FRIEDMAN, *supra* note 78, at 116–18; *see generally* Broadway Bank v. Adams, 133 Mass. 170 (1882).

[199] Claflin v. Claflin, 149 Mass. 19, 20 N.E. 454 (1889).

produced.[200] He would get part of the principal at twenty-one, more of it at twenty-five, and the rest at age thirty.[201] Adalbert was the sole and exclusive beneficiary. Adalbert, who had reached twenty-one, asked the trustee to wind up the trust and turn the rest of the money over to him.[202] Nobody else, he said, has any claim to it: only me. The trustee refused. Adalbert went to court.[203] Adalbert was saying, in a way, that nobody would have the right to complain if the trustee did hand over the money. That was because nobody else had an interest in the trust. Nobody would be worse off. But the court disagreed and sided with the trustee.[204] Someone *would* have been worse off: a dead man, Wilbur Claflin. His wishes would not be carried out. So, as a result, the trust had to go on to the bitter end: to the point that Wilbur had specified. Wilbur had "plainly" expressed a wish: Adalbert does not get the rest of the money, until his thirtieth birthday. That wish would prevail. The dead hand would win.

The facts of the *Claflin* case were unusual; but the so-called *Claflin* doctrine came to have a broader meaning. Trusts would be carried out meticulously. They would be enforced according to their terms. Ending a trust prematurely was possible only if two conditions were met: first, that all the beneficiaries agreed to end it; and second, that the trust had fulfilled its purpose. Obviously, in dynastic trusts there was almost always no way to get all beneficiaries to agree to end the trust. Some of the beneficiaries might be babies. Some might be mentally incompetent. And how could you get signatures from those ghostly characters, unborn and contingent beneficiaries? *Claflin* was a rare situation, in that there was only one beneficiary: a competent adult. But the

[200] *Id.* at 455.

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *Id.* at 456.

trustee and the court still held back, presumably because of the second condition: whether the trust had fulfilled its purpose. And had it? What was the purpose? The will said nothing about any purpose. Therefore, what the case meant, or what it came to mean, was that in trust law, the structure, the plan, the arrangement, was itself the purpose. The wishes of the dead settlor would be followed, and his plan would be upheld, no matter what. If there was a conflict (real or potential) between living beneficiaries and the settlor, or between potential beneficiaries and the settlor, the settlor would have the upper hand: even after the settlor was dead.

Claflin was decided in the late nineteenth century. Old dead-hand fears were gone. Wealth was, as we said, no longer a matter of landed estates in the iron grip of family dynasties—which was never really the case in the United States. Wealth on both sides of the Atlantic was fluid, consisting of stocks and bonds, interests in business, and other marketable assets. New wealth also meant new people. And new managers: professionals, who bought and sold and invested on behalf of rich clients. The law reflected the interests of new wealth and of dynastic trusts. These interests, and the wishes of donors, could reach beyond the grave. The *Claflin* case was a sign of this general tendency in the law—always of course within limits; very notably: within the limit of the rule against perpetuities.

But law (like society) never stands still. In the twentieth century, the balance began to shift once more. In the latter part of the century, there were changes to the modern version of the dead hand. The *Claflin* doctrine, to take one example, became noticeably weaker. Indeed, in England, a statute of 1958 gave courts power to vary (and even revoke) trust arrangements.[205] They could do this when the changes

[205] Variation of Trusts Act 1958, 6 & 7 Eliz. 2, c. 53. Courts could also enlarge the power of the trustees in "managing or administering any of the property" subject to the trust." *Id.*

were for the benefit of beneficiaries, including contingent beneficiaries, and even if some beneficiaries were "by reason of infancy or other incapacity . . . incapable of assenting":[206] or were in fact "unborn."[207] American law was for a while more hesitant. Case law went at least part of the way with regard to administrative rules and the powers of trustees. For these issues, the wishes of the dead settlor were no longer treated as holy writ. There was even movement in the direction of *substantive* variation; that is, changing who gets what, and when, and how.[208] In the United States, there is not yet a kind of doctrine of *cy pres*, or anything quite like it, for private family trusts. But courts seem more willing to ask whether the original plan is outmoded or counterproductive. Courts have allowed changes for reasons that would have been taboo under the *Claflin* doctrine. And some states have gone further: California, for example.[209]

Interestingly, these changes run parallel to changes in the law of wills. Will formalities were also once treated as absolutely sacred: the rules were tight and unyielding; the least flaw in the ceremony could be enough to kill the whole document. Moreover, even if there was some gross, glaring, obvious mistake in a will, courts were reluctant to "reform" this sacred document. This is no longer true. Courts today show at least somewhat more willingness to "reform" wills; they have a tendency to correct or ignore mistakes—at least those that seem to jump out at them. And they are much less fussy about will formalities.

In part, this might reflect general trends in the law—a rejection of what we might call legal fundamentalism. More likely, it reflects the realities of modern estate planning. The

[206] *Id.*

[207] *Id.*

[208] *See* Peter J. Wiedenbeck, *Missouri's Repeal of the Claflin Doctrine—New View of the Policy Against Perpetuities*, 50 MO. L. REV. 805 (1985).

[209] *See* Ronald Chester, *Modification and Termination of Trusts in the 21st Century: The Uniform Trust Code Leads a Quiet Revolution*, 35 REAL PROP., PROB. & TR. L.J. 697 (2001).

last will and testament is no longer what it used to be. The rich basically rely on living trusts. The trusts set out the basic estate plan. Living trusts are formal documents, but not as formal as wills: they do not need witnesses, for example. For modern testators, the will has become a kind of vermiform appendix, a kind of supplement to the trust. The law of trusts and the law of wills seem, in a way, to be going in opposite directions. Wills law shows more respect than before for what the testator actually wanted, even when poor drafting has mucked this up. Trust law seems to show *less* respect for what the testator actually wanted, at least when it comes to *Claflin*-type situations. But even here, arguably, there is no real contradiction. The law aims to preserve the spirit, not the letter, of what the dead man wanted.

Donors and testators seem to have not one, but two dead hands. There is the immediate dead hand: what the will or trust actually says, mostly about who gets what, but here and now. Then there is the dead hand of the future: the long term and dynastic arrangements, and with more and more "give" in the system, courts have gotten more willing to exercise discretion: more discretion about administrative aspects of a trust, about investment strategies, and, to a limited degree, about who gets what, and in what proportions. But perhaps the most dramatic change has been with regard to the *duration* of the trust: change in what was once a pillar of the system: the rule against perpetuities.

VIII. DECLINE AND FALL

Here, the changes have been truly massive. And here, it appears that the dead hand has become *more* powerful—potentially at least—in one fairly obvious and blatant way. The rule against perpetuities once set firm limits on duration. It was a tightly locked and implacable gate—no longer. The rule against perpetuities is, at best, only a feeble memory of itself. It is in fact on the brink of total extinction. Law students can breathe a sigh of relief.

Basically, in state after state, the rule against perpetuities is gone. It departed unsung and unmourned. There was no lobby or interest group to speak up for it; nobody begged the legislature to declare it an endangered (legal) species. Nobody tried to preserve it in cryogenic fluid. A few legal scholars complained that it should have been kept alive.[210] It survives in some places, but it is essentially toothless. Science will never resuscitate it. In this case, dead really means dead.

To be sure, nobody ever really loved the rule against perpetuities, at least in its classic formulation. Courts and scholars and estate planners knew about the rule; they accepted the general idea; but they criticized, sneered at, or were appalled by the freak-show subrules. Proposals were made to reform the rule: to make it sensible at last; to get rid of the unborn widow and the rest of the cluster of absurdities. Some states had already made moves in that direction. The National Conference of Commissioners on Uniform State Laws appointed a commission to draft a better version of the rule.[211] The Conference proposed a new, sleek, modernized rule, the Uniform Statutory Rule Against Perpetuities (USRAP).[212] USRAP kept the general shape and form of the rule but got rid of the excrescences. If, in a trust, the interests of beneficiaries actually vested within ninety years from the birthdate of the rule, they were valid.[213] In addition, if at that time (after ninety years!) some interests had not gotten around to vesting, the court could patch up the plan, "so as to most closely approximate the dispositive plan of the donor and vest within that period."[214] No doubt this seemed like

[210] *See, e.g.*, Chaffin, *supra* note 192.

[211] *See* Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period,* 73 CORNELL L. REV. 157, 157 (1988).

[212] *Id.*

[213] *Id.* at 159.

[214] Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1308–09 (2003).

common sense. It preserved the rule, but in a way that seemed more rational and less destructive.

But the USRAP was not destined to win its struggle. It was run over by a legal bulldozer, which squashed the poor old rule against perpetuities, both the old style and the new. In fact, in a few states, the rule had not been in force to begin with; or was present only in some sort of shriveled form; or had already been eliminated.[215] It was worth noting that, in those states, the sky had not fallen in; no terrible consequences seemed to follow. Trust settlors did not rush into those states to take advantage of the hole in the statute books. Nobody seemed to notice very much. This suggested that the rule had outlived its usefulness—if it was ever in fact useful. But now, somewhat suddenly, the states embarked on a dramatic new course of action. One after another, states simply abolished the rule, leaving nothing in its place, or did something almost equally drastic.[216] USRAP had imposed a ninety-year limit. Bolder states stretched this out longer, as if it was some sort of rubber band: incredibly long, in some states. In Nevada, a "nonvested property interest is invalid . . . unless it either vests or terminates within 365 years after its creation."[217] That was not long enough for Colorado. In Colorado, after 2001, a "nonvested property interest" could last an astonishing 1,000 years, before it had to vest or terminate.[218]

States like Colorado, along with states that got rid of the rule altogether, opened the door to something quite new: so-called dynasty trusts. A dynasty trust is a kind of dynastic trust on steroids. It could last 365 years, or 1,000 years, as noted; in states that simply repealed the rule, there was now

[215] *See id.* at 1313–16.

[216] *See* Garrett Moritz, *Dynasty Trusts and the Rule Against Perpetuities*, 116 HARV. L. REV. 2588, 2591 (2003).

[217] NEV. REV. STAT. § 111.1031 (2019).

[218] COLO. REV. STAT. § 15-11-1102.5 (2016).

no time limit at all. In Delaware, for example, a trust that holds stocks and bonds can last forever—or at least until the solar system explodes or the earth gets sucked into some black hole in the galaxy.[219]

This, of course, goes beyond anything H. G. Wells imagined. Indeed, it goes beyond anything *anybody* imagined. A thousand years (the Colorado limit) is a very long time. Think about how much the world has changed since the eleventh century. This was the century in which William the Conqueror invaded England. It was centuries before the voyages of Christopher Columbus; or the invention of the cell phone; or women's suffrage; or suffrage for anybody. It was centuries before there was a Colorado, or a Nevada, or a Delaware. A thousand years from now, will there in fact *be* a Colorado? Will there be such a thing as a trust? And when the Colorado trust expires, in Delaware (if there is a Delaware) and in North Carolina (if there is a North Carolina) and in some other states (if there are "states" at all) perpetual trusts could still be chugging along. The present state of the law at least makes this possible.

In a handful of states, the death of the rule against perpetuities has raised a question of legality. In one of these states, for example, North Carolina, there is a provision in the state constitution (section 34 of the Declaration of Rights) stating that "perpetuities . . . shall not be allowed."[220] Did this mean abolition of the rule against perpetuities was invalid? Apparently not. A trust, said the court, would be void "if it suspends the power of alienation" past the old perpetuities period.[221] But so long as the trust can buy and sell and deal with assets, it "may remain valid in

[219] *See* Moritz, *supra* note 216, at 2593.

[220] N.C. CONST. art. I, § 34.

[221] Brown Bros. Harriman Tr. Co. v. Benson, 688 S.E.2d 752, 757 (N.C. Ct. App. 2010).

perpetuity."[222] Arizona thought otherwise. In Arizona, the constitution provided that "no law shall be enacted permitting any perpetuity."[223] This, the Attorney General felt, cast doubt on an Arizona law that allowed 500-year trusts; this law was "likely unconstitutional."[224] In most states, however, the question is simply not relevant.[225]

Trying to peek into the distant future, of Delaware, or Colorado, or planet Earth for that matter, is a job for science fiction. To visualize what the world, the planet, or human society would be like hundreds of years from now, you would need a super version of the time machine; but real-world science, alas, is lagging behind here. Nonetheless, despite the lack of a time machine, people now can, if they wish, set up a trust that lasts forever. But who would benefit from such a trust? Or even from the more modest thousand-year trust? At least one small group of customers would: the cryogenic people with trusts to pay them money when they wake up, yawning, from their long, long sleep. For this group (and their pets), a perpetual trust is pretty much indispensable. Science may take a long time to find a way to attach Ted Williams' head to his body and jolt both body and head back to life. But at least he and his comrades, in their super-cold chemical solution, can rest in peace for now. Their perpetual trusts can continue as long as their (almost) perpetual sleep.

But if such a trust, through canny investments, cost-savings, or otherwise, tends to accumulate over the years, the nightmare in Wells' novella might come to pass—or the nightmare that haunted England in the days of Peter

[222] *Id.*

[223] ARIZ. CONST. art. II, § 29.

[224] Attorney General Mark Brnovich, Opinion Number I18-006 (R17-010), July 2, 2018.

[225] *See* Steven J. Horowitz & Robert H. Sitkoff, *Unconstitutional Perpetual Trusts*, 67 VAND. L. REV. 1769 (2014). The authors feel that the argument for unconstitutionality is the stronger one. As I said, however, this is an issue in only a few of the states.

Thellusson. In Delaware, and the other states that abolished the old rules, this is at least theoretically possible. When you get rid of the rule against perpetuities, presumably you also get rid of the rule against accumulations—just as when a tropical lizard or bird goes extinct so do the parasites and bugs that depended on it.

A Delaware trust, lasting forever, and compounding over the years, centuries, and millennia, is too horrible to contemplate. But is this a real danger? Are there customers, aside from the frozen people, who would actually set up this kind of trust? A person could, conceivably, do something along the lines of the medieval fee tail: that is, the trust would pass from eldest son to eldest son, or eldest daughter, if one prefers. And this could go on for centuries or even forever. In this day and age, this model seems unlikely. Another possibility would be to set up a trust for the benefit of the donor's children, then his grandchildren, then the great-grandchildren, then the great-great-grandchildren: generation after generation, without end. The more children the original donor had, or some of the descendants, the more the number of beneficiaries would multiply. Professor Lawrence Waggoner, who was horrified by the very idea, claims that after a mere 350 years the perpetual trust might have as many as 114,500 beneficiaries.[226] That would be (of course) totally ridiculous. And also unlikely. At some point, each beneficiary would be entitled to mere pennies, and the administrative costs would eat the principal up. But surely the legislature would have stepped in to end this farce.

Yet there are, in fact, actual dynasty trusts: actual trusts with no clear time limit. Law firms have developed a number of plans; and they have, presumably, real customers. Here is one type: a rich woman sets up a trust. The trustees will pay the income to her daughter, Hepzibah, as long as she lives.

[226] This is from a paper on the "folly" of perpetual trusts, quoted and derided in Bridget J. Crawford, *Who Is Afraid of Perpetual Trusts?* 111 MICH. L. REV. 79, 83 (2012).

Hepzibah also has the power to dispose of the remainder by designating who gets it, but her choice is restricted to members of her family. The legal term for this is a "special power of appointment." Under the terms of her own will or trust, Hepzibah might exercise this right in favor, say, of her son Caleb; she can give him an income for life, together with another special power of appointment. This, then, can go on forever.[227] This is at least more likely (and more attractive) than a modern fee tail or a scheme that could end up with zillions of beneficiaries. But how long would this chain of "special powers of appointment" last? After all, Caleb could end it, or his son Ezekiel on whose behalf Caleb might exercise his power of appointment, or maybe some beneficiary in the next generation. Someone could decide to break the chain of trusts, which would be easy to do: just give the money outright to relatives or friends or to charity.

The rule against perpetuities seemed in some ways fairly sensible (even if it had some nonsensical details). There is no obvious demand for perpetual trusts, or thousand-year trusts, or the like. There are, of course, the cryogenic trusts. But this involves only a handful of people. Why, then, did legislatures kill the rule against perpetuities? Why not just adopt the USRAP or some similar reform? Two linked factors seem to explain this development. The first concerns death taxes: or, specifically, the tax on generation-skipping trusts (GSTs). This tax was added to the code some thirty years ago.[228] It was designed to be a kind of vampire tax, sucking up some of the assets of trusts that skip a generation—a direct trust for grandchildren for life, remainder to great grand-children, for example. The tax is in addition to the normal estate tax, but the current law exempts many millions of dollars so that the tax applies only to fairly large estates.[229] Still, for the very rich, a carefully crafted trust can

[227] RICHARD W. NENNO, DELAWARE TRUSTS 2012 333 (2012).

[228] *See* Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085.

[229] *See* 26 U.S.C. § 2611.

avoid a good deal of tax. The trust described above, using chains of "special powers of appointment," can do exactly that.

The second factor, which is closely related, is the financial interest of law firms that specialize in estate planning, banks and trust companies that do the same, and the states they live and work in. These businesses smelled a chance of attracting rich people, who might benefit from dynasty trusts, making use of the GST exemption. A trust, after all, can be administered anywhere. Rich people in South Carolina can, if they want, set up a trust administered in Fairbanks, Alaska: no need to go there, especially in winter when that town is ghastly cold; the work can all be done long-distance. Alaska can abolish the rule against perpetuities and get a slice of the market in dynasty trusts for itself, its trust companies, and its law firms. States that got rid of the rule against perpetuities, or modified it drastically, were states that saw this as a business opportunity. Mostly these were small states, but then more and more states piled on. Obviously, managing dynasty trusts would never be a big economic factor in California or Texas or New York, but it might be worthwhile for Alaska or Delaware; perhaps even for Colorado. Indeed, a study published in 2005 claimed that a state that got rid of the rule against perpetuities "increased its reported trust assets by about $6 billion and its average trust account size by roughly $200,000."[230] The study estimated that by 2003, "roughly $100 billion in trust assets have moved as a result of the Rule's abolition."[231]

At some point, abolition would not give states a competitive advantage; but still, some states would share this fat slice of business. And, of course, many more dynasty

[230] Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L. J. 356, 359 (2005).

[231] *Id.*

trusts would be drafted. Estate planners would have for sale a number of models of such trusts. Few of these dynasty trusts would be truly perpetual—in practice if not in theory. For one thing, as I pointed out, in trusts that depend on a chain of powers of appointment, the chain is likely to be broken at some point. The money will be left outright to family members, or friends, or to charity. Not many people will want to project a plan that lasts for centuries. Why would they? And, if a few people actually did this, and set up very very long-term trusts, or, even worse, accumulating trusts (cryogenic trusts might do this), society might face the Thellusson nightmare or the nightmare in H. G. Wells' novella. But surely government would step in, and *do* something, before these trusts swallowed every single company on the New York Stock Exchange; or on whatever replaced the stock exchange; or on whatever replaced the replacement. A perpetual trust, capable of swallowing up trillions and trillions, is simply not going to be allowed to do its evil deed. We are better off worrying about atomic war, or some climate catastrophe, or some lethal pandemic. Still, nothing in Colorado law, as far as I can see, actually prevents a settlor from setting up a thousand-year trust; or a trust in Delaware that lasts forever. But nobody should lose any sleep over this development.

Taxes and competition for trust business: these go a long way to explain the death of the rule against perpetuities. Do they explain everything? Dukeminier and Krier, among others, think so. Perpetual trusts, they feel, have "little if anything to do with some wish on the part of wealthy people to control the lives of their unknown descendants."[232] The academic literature tends to agree with their conclusion. Shrewd marketing, and the ambitions of some law firms also played a role. But is this really all there is? Certainly, few if any billionaires have a burning desire to control their great-great-great-great grandchildren and *their* great-great-great-

[232] Dukeminier & Krier, *supra* note 214, at 1314–15.

great grandchildren. Even Peter Thellusson knew that this was impossible. In our world, to be sure, some rich people are positively obsessed with ways to avoid and evade taxes. But this is mostly for their own personal benefit; and the benefit of their immediate families; and possibly one or two generations down the line. It is unlikely, to say the least, that a billionaire actually cares whether his descendants in Colorado Springs (if there is such a place a thousand years from now) will enjoy favorable tax treatment. What are the chances that the Internal Revenue Code will last that long?

All this is surely true. Yet can we really ignore entirely the psychology of the very rich?[233] Yes, taxes matter, and the business interests of trust companies and law firms also matter. On the other hand, the tax advantages of dynasty trusts are quite possibly overrated. In a closely reasoned piece, James R. Hines, Jr. makes this argument.[234] He also points out that tax rates and tax policies are hardly static. The rates go up and down. The laws change. How long is the present system going to last? Are we sure the rules about generation-skipping trusts will be around fifty years from now? Rich people could "ultimately discover" that their plan may have "unanticipated tax or nontax consequences," but at that point it might be too late to change or modify the terms of the trust.[235] Hines feels that this cloud of uncertainty may be one reason why "prudent potential settlors" will think twice about setting up perpetual trusts.[236]

[233] Ronald Chester, in an article published in 2008, drew a contrast between wills in the old days, which were "more personal, immediately hands-on, and less packaged than those of today." A person executing a will "is staring death in the face;" trusts, on the other hand, are "seen as financial tools . . . thus allowing the client to feel more like a savvy investor than a person on the precipice." New and flexible forms of trusts "are the cornerstone of newer types of dead hand control." Ronald Chester, *The Psychology of Dead Hand Control*, 43 REAL PROP., TR. & EST. L.J. 505, 519 (2008).

[234] *See* James R. Hines, Jr., *How Important Are Perpetual Tax Savings?*, 27 TAX POL'Y & ECON. 101 (2013).

[235] *Id.* at 123.

[236] *Id.*

This is a sensible and realistic point. Laws, including tax laws, constantly change. But this point might not be decisive for a few "potential settlors." For these few, tax considerations, no matter how enticing, have to share psychological space with a true dynastic urge. The perpetual trust for such people would be yet another form of immortal longing: yet another form of an old dream, a dream of projecting a plan, a name, a ghostly presence, far past the grave and into the distant future. It is a dream of a kind of mental time machine. There are many ways, as we saw in these pages, to satisfy these longings. Most billionaires and multi-millionaires will take other paths: setting up charitable foundations, for the most part; or endowing in their name hospitals, museums, symphony halls, and buildings on college campuses. A few will set up cryogenic trusts.

How many, then, will actually want a true dynasty trust, perhaps even a perpetual trust? Hard to say. But the number is surely greater than zero. An article published in 2005 quoted websites of estate planners appealing to those who might have this kind of immortal longing. One website lured potential customers by telling them that their "heirs, for unlimited generations to come, will be grateful to you, their great, great ad infinitum, grandparent"; another website called a dynasty trust "regal" and "rewarding."[237] The "evidence of the articles and websites suggests that at least some settlors may be interested in the fact that a perpetual trust can last forever and take care of their unborn descendants."[238] Some people might find the idea of dynasty trusts repellent or even dangerous. Still, they do exist and are likely to continue to exist; and their numbers might grow. One author at least feels that such trusts respond to a deep

[237] Joshua C. Tate, *Perpetual Trusts and the Settlor's Intent*, 53 KAN. L. REV. 595, 619 (2005).

[238] *Id.*

psychological urge, and one which has very little to do with "biological relatedness and much to do with continuity."[239] I find it hard to see how these perpetual or long-term trusts advance "continuity," or even what "continuity" might mean. Continuity of what?

Still, at least some mouths (in the legal profession) are watering at the thought of tapping into this business. How much business is hard to say. This is a relatively new institution, arising as it did, like a phoenix, out of the ashes of the rule against perpetuities. One thing is clear: the dynasty trust calls for fresh drafting skills and new management skills. Lawyers are happy to oblige with the drafting skills. The management skills are trickier. Everybody agrees this kind of trust needs great flexibility. It has to cope with so many uncertainties, including the snowball effect of social and legal change and the enormous challenge of foreverness. Who will manage these dynasty trusts? For their early years, the answer is obvious. Banks and professional trustees and law firms will be happy to do the job—for a price, of course. But in the long run? Perhaps, as at least one scholar has suggested, we could dispense with human beings altogether.[240] Why not a so-called "robo-trust," making use of the tools of artificial intelligence? The robo-trust could achieve "flexibility" by "stripping trustees of nearly all independent decision-making power and instead binding them to the computer's decisions."[241] In this way, the super-rich who are "seeking vicarious immortality" can make sure that "it is their will, not a trustee's, that perseveres."[242] A perpetual trust, managed by a computer program, with no real human beings at the helm: is this what the future has in store? This essay began with science fiction; the robo-trust

[239] Danny Fein, *A Defense of Perpetual Trusts*, 47 ACTEC L.J. 215, 238–39 (2022).

[240] Michael Vincent, *Computer-Managed Perpetual Trusts*, 51 JURIMETRICS 399, 420 (2011).

[241] *Id.*

[242] *Id.*

brings us back to something close to that. The extreme case: no beneficiary, except a body permanently frozen; no trustee, except a computer; nothing human about the trust at all; it hums on, generation after generation, a machine that can run on its own with no living hand at the wheel.

And why not? Of course, most of us (including myself) think the whole idea is preposterous: a robo-trust, a perpetual law machine—ridiculous. We think, too (and I include myself), that the cryogenic people, asleep in their super-cold liquid, are deluding themselves. Could we be wrong? Medical science has done wonders in the last two centuries. People are alive today who in the past would have died of cholera or diabetes or smallpox. If only they could have waited, in some sort of suspended animation, they might have been saved. It is possible to imagine even more wonderful things: Mozart, back with us to write more great music. The cloned dinosaurs of Jurassic Park are science fiction; but it might be possible to bring back the hairy mammoth and return it to the tundra. We might be able to do the same for the dodo, or Steller's sea-cow, or the Tasmanian tiger, and other extinct creatures, so long as they left behind a bit of DNA. And if so, then why not dead people? Some long-dead Pharaoh on the basis of a scrap from a mummy case? Or we could use DNA from some relic of a medieval saint—a fingernail, for example, lovingly preserved in a reliquary? A fragment left behind by Henry VIII or the first Queen Elizabeth?

Imagine a world in which people did not die at all, or lived as long as giant tortoises or the bristle-cone pine tree of California. Science fiction writers must have played with this theme already. Longevity of this type would pose enormous social, political, economic, and cultural problems. Or suppose *most* people died, but a few did not—the very, very rich, who could pay some staggering price for the latest in medical science. H. G. Wells' nightmare might become something real. Or imagine a nightmare in which descendants of a modern-day Thellusson live on to run the country or the world.

What we have, right now, is not yet science fiction. A few people pay to have their bodies frozen and preserved. This is, of course, a testimony to our faith in science and in scientific progress. A few people make trusts that last for centuries, or even longer. Both of these actions reflect a vain hope of conquering death, or at least reflect a passion for immortality—a passion as old as the Pharaohs (if not older)—a passion which gives religion much of its awesome power. And many people have some kind of passion for vicarious immortality, which has been the subject of these pages. To be sure, only the rich can afford to indulge in this passion.

The rise of the dynasty trust, for the most part, seems to be a matter of business, of taxes, of dollars and cents. It is part of the long-term trend we mentioned: a trend that, on balance, gives wealthy and powerful donors what they want—at least temporarily. This trend has had its ups and downs. History is never simple and linear. But (at the risk of oversimplifying) the main lines of development are as follows: during the Middle Ages, the landed gentry dominated English society. Their estates gave them power and wealth. The law protected and fostered their interests and the interests of their families. Their estates went from eldest son to eldest son over the generations.

In time, the system decayed; a new system took its place. Restraints on alienation were disfavored. In England, the landed gentry lost at least some of its power. Many great families showed a talent for downward mobility. Many of them lost their land, their money, and their influence. Death taxes and debts added to their miseries. They moved out of their stately homes. They lost their armies of maids, footmen, chauffeurs, butlers, and gardeners. Some survived by offering guided tours or selling trinkets in their gift shops. Their homes became tourist attractions. Power passed to the new class of capitalists. *These* now became favorites of the law. Doctrines developed that favored this class, both before and after death. The old dead hand was dead. The new dead hand survived, but within limits—one limit, very notably, was the rule against perpetuities. And now that is gone.

The American story resembled the English story in certain ways. There was never anything quite like the English gentry, except perhaps in the plantation South. American elites believed in markets. They believed in growth, dynamism, expansion. The dead hand was unpopular, insofar as it meant the power of churches, especially the Catholic church; law and society disfavored restraints on alienation, just as had been the case in England. Land was a commodity, something to be bought and sold and traded. A new class of the rich developed. Their wealth was business wealth—enterprise wealth. Old restrictions were repealed. In the law of trusts, doctrines developed which favored the rich entrepreneur. The law even honored their wishes after death; the law favored dynastic trusts. It also came to favor charitable foundations. These became (as the phrase went) favorites of the law. For private trusts, there was (as in England) the rule against perpetuities, part of the gated community of legal doctrine, which served as a temporal boundary to long-term trusts. Then the rule against perpetuity was shoved into the dust-heap of history. One of the last restraints on the power of the rich to rule from the grave was removed.

Some of today's super-rich are members of older families: Mellons and Rockefellers and Duponts (though "old" in the United States is not usually a matter of centuries). The richest of the rich are new people, who seemed to come up out of nowhere. They are entrepreneurs, high-tech innovators, founders of new companies, men and women who enjoy the glitter of celebrity. They and their cheerleaders claim that the nation is and stays great because of them. They give jobs to thousands. They produce innovation and progress. They are also benefactors: they use money to promote themselves during their lifetimes; they make huge gifts to churches and the arts and to higher and lower education. And they project their influence long after they die. Their foundations carry their names. Their names are also plastered on campus buildings, hospitals, museums, and symphony halls.

Peter Thellusson wanted to do something more: he wanted to create a leviathan of wealth. Stephen Girard hoped to micro-manage his college through all eternity. Rich men and women set up foundations to carry their name and their message forever. Benjamin Franklin's plan was scheduled to last two centuries. All of these founders, with a few exceptions, got what they wanted: at first. But in the end, not. Their immortal longings were wrecked on the shoals of legal and social change. The form might survive (there is still a college in Girard's name[243]) but not the substance.

Today we have foundations; and we have dynasty trusts. The creators are not, for the most part, modern day Thellussons. Yet nothing in the law seems to make it impossible for a new Thellusson to arise (at least nothing so far); or a modern Girard; or a modern Henry Ford. But all of them, most likely, will suffer the same fate. Law and society will move on and reshape their plans to suit new circumstances and new ideas.

Forbes Magazine publishes a list of billionaires every year; there are hundreds on the current list, and the numbers seem to be rising.[244] Some people on the list have fortunes of unbelievable size. Even a billion dollars is a staggering amount, and a hundred billion may be almost a hundred times more staggering. Fortunes in the billions dwarf the gross national product of some poor countries with millions of inhabitants.

It is hard to compare the biggest fortunes of today with older ones: who is to say that Bill Gates or Jeff Bezos is richer

[243] *See* GIRARD COLLEGE, https://www.girardcollege.edu (last visited July 31, 2023).

[244] *See World's Billionaires List*, FORBES, https://www.forbes.com/billionaires/ (last visited July 31, 2023).

than John D. Rockefeller was in terms of power and influence; or Stephen Girard; or, for that matter, richer than Louis XIV, or (to take a modern instance) the King of Saudi Arabia, or the Sultan of Brunei? Great moguls of the past paid no income taxes or estate taxes. They had enormous power. Today, in more-or-less-democratic societies, the state *could* slap high taxes on great fortunes, including high death taxes, wealth taxes, taxes of any and all kinds. There is nothing to prevent the state from enacting laws to limit the power of the rich. Something like this process took place historically in most western, developed countries. These countries raised taxes, redistributed income, and created various versions of the welfare state.

But if there is a movement today, in the United States or in any other democratic country, to cut great fortunes down to size, it has somehow escaped me. To be sure, the welfare state is evidence that the rich do not always have their way. They have to pay a price. In a way, successful countries like Sweden or New Zealand have survived and prospered by giving some power to ordinary people and providing health care, pensions, free schooling, and subsidized day care for most of their citizens. Still, particularly in recent times, redistribution, and any serious form of "levelling," seems to have gone out of fashion. If anything, the trend has been to lower tax rates and denature death taxes.

In the United States, if you work for a company, at a yearly salary of $100,000, you will pay income tax on what you earn. If you inherit $100,000 from an uncle, you pay nothing. There is no tax on those who receive gifts and inheritances. The estate tax is a tax on estates of the dead, not on their heirs as such. The estate tax can be significant for very large estates. The highest estate tax rate was 77%, in the years roughly between 1940 and 1976.[245] But in recent

[245] *See Federal Estate and Gift Tax Rates, Exemptions, and Exclusions, 1916-2014*, TAX FOUND. (Feb. 4, 2014), https://taxfoundation.org/

times, the tax machine has gone in reverse. The top rate in 2023 is 40%, but estates under $12 million pay nothing.[246] Gifts to charity—and to foundations—also pay nothing. State death taxes are fairly minor. Some states do not have them at all. California once had an inheritance tax. It was abolished in the 1980s, by referendum.[247] People flocked to the polls, to vote down a tax which affected only a tiny sliver of the population; even for *those* people, it was not much of a bite.

Polls suggest that most people in the United States, if you ask them, think the rich and the super-rich should pay more in taxes. These polls might be accurate, but they are, after all, just talk. The only polls that really count are elections. And at these elections, people freely vote for candidates who have no intention of raising taxes on the rich; in fact, they vote for candidates who refuse to raise any taxes on anybody for any reason. Not one person in a thousand has any thoughts about dynasty trusts or even knows that they exist. And if people *did* know, would they care?

Wells' novella painted a dystopian future, the evil product of a long-term trust. Peter Thellusson's will, with its threat to gobble up assets, frightened the English Parliament into action. Perpetual cryogenic trusts, managed by robots, could pose a Wellsian threat, a Thellusson threat, to society. The threat would come from the power to accumulate, the power to grow metastatically over the years. Could this actually happen?

Probably not, if past experience is any guide. The

data/all/federal/federal-estate-and-gift-tax-rates-exemptions-and-exclusions-1916-2014/.

[246] *See* Amelia Josephson*, A Guide to the Federal Estate Tax for 2022 and 2023*, NASDAQ (Mar. 7, 2023, 12:24PM), https://www.nasdaq.com/articles/a-guide-to-the-federal-estate-tax-for-2022-and-2023.

[247] *See* California Estate and Gift Tax Act of 1980, AB 2092 (1980). In general, an estate tax is a tax on the whole estate, not on the people who inherit; an inheritance tax is a tax on the shares people inherit; the tax rate may depend on who they are (money left to a spouse or a child might be taxed at a lower rate than money left to a friend).

Thellusson fortune evaporated. Social change did its work on Girard College in Pennsylvania and on Clayton College in Colorado. The great foundations swell in size, and their numbers grow, but in time they pass out of family control and into the hands of professional managers. The fate of thousand-year trusts, if there are any, remains to be seen. But very long-term trusts depend on something that we know is not true: that the law of trusts, indeed, the law in general, consists of a stable clutch of doctrines and institutions that can last for centuries or even millennia. Nothing is less likely. Consider, for example, how much the law has changed since (say) the eighteenth century, or even the nineteenth century. Judges invented the rule against perpetuities; then, judges and legislatures got rid of it. There is no limit to the legal tools in society's toolbox. These tools could handle any danger from runaway accumulations or from any other monsters that might emerge from perpetual trusts.

In short, perpetuities and immortal longings do not seem particularly dangerous. The dead, in fact, do not constitute that much of a threat: certainly not a long-term threat. But the *living*: that is another matter. The living, after all, have powers that the dead cannot have. There is no reason to be afraid of Peter Thellusson, or Stephen Girard, or Henry Ford, or Rockefeller. They were once mighty folks; but after they died, their powers were only those that social forces and living institutions chose to grant them. And even those powers faded over time. These dead men cannot come back to haunt us. But the *living*: that is another story. The social power of the super-rich might be a danger right now, not years and years in the future. Those billions in the hands of living people—and living institutions—are a tremendous force. The clutching claws, and the massive power, of the super-rich can bend and twist the social order much more than anything the dead hand can do.