

## ARTICLES

### RESTRICTING TESTAMENTARY FREEDOM: EX ANTE VERSUS EX POST JUSTIFICATIONS

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*The organizing principle of American succession law—testamentary freedom—gives decedents a nearly unrestricted right to dispose of property. After surveying the justifications for testamentary freedom, I examine the circumstances in which it may be socially beneficial for courts to alter wills, trusts, and other gratuitous transfers at death: imperfect information, negative externalities, and intergenerational equity. These justifications correspond with many existing limitations on the freedom of testation. Yet, disregarding donor intent to maximize the donees' ex post interests, an increasingly common justification for intervention, is socially undesirable. Doing so ignores important ex ante considerations, including a donor's happiness, a donor's incentive to work, save, and invest, and the structure and timing of a donor's gifts. If donors believe courts may not facilitate their intent, donors may be less happy, accumulate less property, and alter gifts during life. Moreover, because the law often affects donor behavior, ignoring donative intent to benefit particular donees may harm not only the donors but also donees as a class. Thus, the living may themselves benefit if the law allows a certain degree of "dead hand" control.*

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“The brutal fact remains: the dead are definitively dead. The dead ‘control’ beyond the grave only insofar as living people let them do so. In the long run, the dead run nothing.”<sup>1</sup>

“How, possibly, can the ‘use’ of a dead person, albeit through the use of another, have normative force? Though we appear to respect the intentions of the dead, we may be fools to do so.”<sup>2</sup>

#### INTRODUCTION

The law generally defers to owners in deciding how to use their property. One justification for this deference is that owners typically internalize the benefits and costs of their actions. Therefore, an owner’s private incentive to use property often will coincide with its socially optimal use. Similarly, the law usually defers to donors in deciding the nature, timing, and recipients of gifts, including gifts at death. For example, in interpreting a will or trust,<sup>3</sup> the “controlling consideration” is the donor’s intention.<sup>4</sup> One justification for privileging donative intent, like the justification for deferring to owners in how they use their property, is that doing so will promote social welfare.<sup>5</sup>

Testamentary freedom has several advantages. Transferring property at death functions as another use of property; consequently, effectuating a donor’s intent should maximize the donor’s happiness. Testamentary freedom also aligns an individual’s incentive to work, save, and invest with what is socially optimal, promoting capital accumulation and long-term productivity. In addition, a donor may have more information than either a legislature or court about the optimal distribution of property to family members or other donees. Finally, testamentary freedom may have benefits for familial relationships by increasing parental control over children or

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1. LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* 182 (2009).

2. J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 99 (1997).

3. A donor may transfer property via a will (testator) or trust (settlor), and a donee may receive property by means of a will (devisee) or trust (beneficiary). While the trust is a common technique for avoiding probate and allocating property, the analysis in this Article could apply to a range of nonprobate transfers including not only revocable trusts but also life insurance policies and brokerage or retirement accounts with beneficiary designations.

4. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (2003) (“[L]aw does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor’s decisions about how to allocate his or her property.”).

5. On social welfare and the assumptions of welfare economics, see *infra* note 51. On why a property owner’s private incentive to use property may converge with the socially optimal result, see Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967). An owner’s private incentive may diverge from the socially optimal result if the owner’s use entails a negative (or positive) effect on others. In the context of donating property (rather than using it), there is also a concern about both external costs, see *infra* Part III.A.2 (discussing justifications for restricting testamentary freedom based on the existence of “negative externalities”), and external benefits. See Louis Kaplow, *Tax Policy and Gifts*, 88 AM. ECON. REV. 283, 284 (1998) (“Gifts convey a sort of positive externality on donees” (citing Louis Kaplow, *A Note on Subsidizing Gifts*, 58 J. PUB. ECON. 469 (1995) [hereinafter Kaplow, *A Note on Subsidizing Gifts*], and A.B. Atkinson, *Capital Taxes, the Redistribution of Wealth and Individual Savings*, 38 REV. ECON. STUD. 209 (1971))).

encouraging children to care for parents. Given these benefits, as well as the costs of attempting to prohibit donative transfers, a system of succession based on the freedom of disposition is arguably the “least objectionable arrangement for dealing with property on the owner’s death.”<sup>6</sup>

Yet the law does not privilege donative intent in all circumstances. Courts may alter a gift by refusing to enforce the provisions of a will, modifying or terminating a trust, or interpreting the terms of a will or trust. Is such intervention warranted? If so, under what circumstances should the courts intervene? Using insights from the economic analysis of law, this Article examines the justifications for restricting testamentary freedom and the circumstances in which it may be socially desirable or undesirable for the law to alter wills, trusts, and other gratuitous transfers at death.

My thesis has two parts: (1) there are several legitimate justifications for legal intervention in donative transfers at death, including (in theory) imperfect information, negative externalities, and intergenerational equity; however, (2) intervening to maximize the donees’ ex post interests is not a legitimate justification for disregarding a donor’s wishes. Clarifying the justifications for legal intervention in donative transfers at death has payoffs for legislatures, courts, and law reformers.<sup>7</sup>

Consider three justifications for restricting testamentary freedom. First, due to *imperfect information*, including unforeseen as well as unprovided-for contingencies, altering a will or trust may be desirable. Suppose a donor (*D*) leaves money for the cure of polio. Twenty years later, scientists discover a cure.<sup>8</sup> Reallocating *D*’s gift (e.g., to fund the cure for another disease) is likely to be socially beneficial, and consistent with *D*’s probable intent, even if *D* did not provide for this contingency in her will or trust.

Second, if a gift entails *negative externalities*, intervening may be desirable if the private incentive to give diverges from the socially optimal result. Suppose *D* has \$10 million but *D*’s spouse (*S*) and minor child (*C*) have \$0. Assume *S* and *C* will receive public support if *D* disinherits them. Knowing this, *D* may reduce or eliminate a gift to *S* and *C*. As a result, the law may require that *D* provide some minimal level of support.<sup>9</sup>

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6. Edward C. Halbach, Jr., *An Introduction to Chapters 1–4*, in *DEATH, TAXES AND FAMILY PROPERTY* 3, 5 (Edward C. Halbach, Jr. ed., 1977).

7. Legal intervention can be either legislative (e.g., a state legislature’s enactment of an elective share) or judicial (a state court’s modification of a trust). Probate and state courts often base their decisions on statutory law, as well as the *Restatements* and *Uniform Codes*, so the rules of succession can and will affect the circumstances in which a court intervenes. Thus, while I will speak often of “courts” and “judicial” intervention, my analysis is relevant not only, or even primarily, to judges, but also to legislatures and law reformers.

8. Between 1950 and 1963, Hilary Koprowski, Jonas Salk, and Albert Sabin independently developed polio vaccines. See DAVID M. OSHINSKY, *POLIO: AN AMERICAN STORY* 268 (2005).

9. In the United States, all separate property states, except Georgia, provide a spousal elective share. See Verner F. Chaffin, *A Reappraisal of the Wealth Transmission Process: The Surviving Spouse, Year’s Support and Intestate Succession*, 10 GA. L. REV. 447, 458 (1976). Yet, no state, except Louisiana, has a forced share for minor children. See Ralph C. Brashier, *Protecting the Child from Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1, 23 (1996).

Third, legal intervention may be necessary due to considerations of *intergenerational equity*. Given its priority in time, the present generation may have an incentive, as well as the ability, to control property in ways that favor its own interests to the detriment of future generations. Assuming the measure of social welfare gives significant weight to the well-being of future generations, the private incentive of a donor living today may again diverge from the socially optimal result.<sup>10</sup>

After exploring these justifications for restricting testamentary freedom, this Article argues that another justification—disregarding donative intent to maximize the donees' ex post interests—is socially undesirable.<sup>11</sup> This justification is increasingly common in the law of succession.<sup>12</sup> However, allowing a court to maximize a donee's welfare ex post is problematic for it fails to incorporate ex ante considerations. These considerations include, among other things, a donor's happiness during life, the donor's incentive to work, save, and invest, and the structure and timing of a donor's gifts.

Failing to incorporate ex ante considerations into the legal analysis is problematic because ex ante considerations can affect the interests of the donors as well as donees. For example, if courts disregard donative intent at death, donors may be less happy during life, and this decrease in donor happiness may outweigh any increase in donee happiness.<sup>13</sup> In addition, disregarding donative intent may harm the donees themselves. In response to the possibility of legal intervention, a donor may alter her behavior. For example, if *D* believes courts will not facilitate her intent, *D* may consume more during life. If *D* owns less property at death, the donees will inherit less wealth. Moreover, if *D* anticipates that a court will intervene and ignore her intent, *D* may alter her disposition by making a gift during life, choosing different donees, or forgoing the gift entirely.<sup>14</sup> As a result, even

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10. See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 71 (2004).

11. Focusing exclusively on the donees' welfare ex post is problematic, notwithstanding a trustee's duty to manage a trust on behalf of beneficiaries. See RESTATEMENT (THIRD) OF TRUSTS § 78(1) (2007) (“[A] trustee has a duty to administer the trust solely in the interest of the beneficiaries, or solely in furtherance of its charitable purpose.”); cf. John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 980–82 (2005) (discussing a trustee's obligation to act in the “best interests” of the beneficiaries).

12. See Thomas P. Gallanis, *The New Direction of American Trust Law*, 97 IOWA L. REV. 215, 216 (2011) (“American trust law, after decades of favoring the settlor, is moving in a new direction, with a reassertion of the interests and rights of the beneficiaries.”); cf. Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236 (1996) (“A careful review of case law . . . reveals that many courts do not exalt testamentary freedom above all other principles.”).

13. Although fairly straightforward, this insight illustrates the flaws in a common argument for interfering with a bequest: “The donor is dead. Ignore the dead guy's wishes, and let's do whatever is best for the living.” See Joel C. Dobris, *Undoing Repeal of the Rule Against Perpetuities: Federal and State Tools for Breaking Dynasty Trusts*, 27 CARDOZO L. REV. 2537, 2548–49 (2006) (“I can't believe that reverence for some dead guy's intent is going to determine major outcomes.”). Such an argument could be sound only if one assumes that a particular donor, while alive, believes the law will facilitate her wishes, even though courts are often unwilling to facilitate the wishes of others.

14. See SHAVELL, *supra* note 10, at 66 (“[L]egal policies controlling inheritance can be partially circumvented by increases in inter vivos gifts. For example, were a law to require

if individual donees have an incentive to attempt to modify a donor's gift in particular cases, donees may be worse off as a class if courts restrict testamentary freedom while ignoring important ex ante considerations.<sup>15</sup>

In some respects, the justifications for intervening to alter wills and trusts are analogous to the justifications for modifying or interpreting contracts. Contract scholars have analyzed similar issues that arise because parties are unable to anticipate future contingencies or may not wish to incur the costs of specifying additional contingencies even if they are foreseeable.<sup>16</sup> Thus, insights from contract law may be useful in analyzing succession law.<sup>17</sup> Yet, succession law involves an issue that is usually absent in contract law: dead hand control.<sup>18</sup> Indeed, unlike in contract law, "renegotiation" with the donor is no longer feasible in wills, trusts, and estates.<sup>19</sup>

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that half of a person's property pass to the person's spouse and children, the person could transfer much of his wealth to an alternative preferred donee during his life."). The concern is that restricting testamentary freedom without incorporating ex ante considerations may reduce the "size of the pie" by distorting various incentives of donors and donees, including decisions about saving versus consuming, working versus not working, giving later versus giving now, and the like. The question of the extent to which various doctrines in succession law distort these incentives is an empirical question that is beyond the scope of this Article.

15. To alter a bequest or modify a trust for their own benefit, individual donees may have an incentive to litigate. But if a court disregards donative intent, litigation may harm donees *as a class* because the incentive of particular donees is not necessarily aligned with the overall interests of donees. See Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 659 (2004) (making this point in the context of trust modification and termination). It is also worth noting that the class of donors or donees is not static, as the donees in one generation are likely to become the donors for the next generation.

16. See, e.g., Steven Shavell, *On the Writing and Interpretation of Contracts*, 22 J.L. ECON. & ORG. 289 (2006); see also Benjamin E. Hermalin et al., *Contract Law*, in 1 HANDBOOK OF LAW AND ECONOMICS 3, 68–99 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (discussing incomplete contracts).

17. On trusts as contracts, see John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995). See also Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 447–50 (1998); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 844–45 (2001).

18. In its modern usage, dead hand control refers to the idea that a person who has died may continue to assert control over his or her property even after death. See FRIEDMAN, *supra* note 1, at 4 (discussing postmortem control by the dead). Postmortem control is possible both at the time of death (via a will) and for many years after death (via a trust). See ADAM SMITH, LECTURES ON JURISPRUDENCE 467 (R.L. Meek et al. eds., Oxford Univ. Press 1978) (1766) ("To give a man power over his property after his death is very considerable, but it is nothing [compared] to an extension of this power to the end of the world."); John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1111 (2004) ("The distinctive attribute of a trust is that it can and commonly does perpetuate the settlor's autonomy after his or her death (hence the dead-hand label)."). Originally, the term "dead hand" most likely referred to a *donee*, not the *donor*, especially a donee who was not able to perform certain feudal obligations. See SHAVELL, *supra* note 10, at 67 n.67 ("[T]he term 'dead hand' originally referred to the *donee*, notably, to a religious corporation that had been granted land." (citing LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 2–3 (1955))).

19. Cf. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 699 (8th ed. 2010) (noting the impossibility of "recontracting" in wills, trusts, and estates).

This issue—the extent to which the law should facilitate the wishes of the dead over the lives of the living—is a perennial one.<sup>20</sup> And debates about the scope of dead hand control are not merely of philosophical or historical interest.<sup>21</sup> Estimates suggest that, in the United States alone, at least \$41 trillion will pass between generations from 1998 to 2052.<sup>22</sup> The magnitude of this potential wealth transfer is due, in part, to the “baby boomers,” the generation of Americans born between 1946 and 1964.<sup>23</sup> However, there is no evidence to suggest that these “baby boomers” will be less inclined to assert postmortem control over their property, and some evidence to suggest that incentive trusts, which allow a settlor to delineate the terms and conditions of a gift, continue to be a common estate planning technique.<sup>24</sup> Moreover, because several states have recently abolished the rule against perpetuities (RAP), thereby clearing the way for “perpetual” or “dynasty” trusts,<sup>25</sup> there is renewed interest in the dead hand among legislatures and courts as well as legal scholars and law reformers.<sup>26</sup>

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20. Thomas Jefferson, in writing to James Madison, argued that the question of “whether one generation of men has a right to bind another,” including intergenerational transfers of land, is a “question of such consequences as not only to merit decision, but place also among the fundamental principles of every government.” Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 3 THE WRITINGS OF THOMAS JEFFERSON 103 (H.A. Washington ed., N.Y., John C. Riker 1854); see also Jed Rubenfeld, *The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085, 1087 (1998) (discussing Jefferson’s letter to Madison and noting Jefferson “argues against all inherited obligations, including those of inherited laws”).

21. See FRIEDMAN, *supra* note 1, at 4, 179 (noting that, while “it has suffered greatly from scholarly neglect,” succession law and questions “about the rights and powers, the scope and limits, of the dead hand” are of “immense importance socially, culturally, and economically”).

22. See John J. Havens & Paul G. Schervish, *Why the \$41 Trillion Wealth Transfer Estimate Is Still Valid: A Review of Challenges and Comments*, 7 GIFT PLAN. 1 (2003).

23. See GRAYSON K. VINCENT & VICTORIA A. VELKOFF, U.S. CENSUS BUREAU, THE NEXT FOUR DECADES: THE OLDER POPULATION IN THE UNITED STATES: 2010 TO 2050 (2010), available at <http://www.census.gov/prod/2010pubs/p25-1138.pdf>.

24. Although the empirical data is limited, one estate planning survey suggests that 57 percent of Americans with \$10 million or more in assets and 42 percent of Americans with \$5 to \$9.9 million in assets utilize an incentive trust. PNC FIN. SERVS. GRP., INC., PNC WEALTH MANAGEMENT WEALTH AND VALUES SURVEY: INHERITANCE HIGHLIGHTS 2007, at 2 (2007), available at [https://www.pnc.com/webapp/unsec/Requester?resource=/wps/wcm/connect/aba13c004e5c6f3e8f078ffc6d630ad7/PNC\\_WV\\_Inheritance\\_Highlights.pdf?MOD=AJPERES&CACHEID=aba13c004e5c6f3e8f078ffc6d630ad7](https://www.pnc.com/webapp/unsec/Requester?resource=/wps/wcm/connect/aba13c004e5c6f3e8f078ffc6d630ad7/PNC_WV_Inheritance_Highlights.pdf?MOD=AJPERES&CACHEID=aba13c004e5c6f3e8f078ffc6d630ad7).

25. See generally Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303 (2003) (discussing perpetual trusts). On the rise of perpetual trusts and abolition of the RAP, see generally Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465 (2006), and Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005).

26. In response to such developments, many legal scholars have not only denounced dynasty trusts, but have also hypothesized that American law is ceding too much power to the deceased. See, e.g., RONALD CHESTER, FROM HERE TO ETERNITY? PROPERTY AND THE DEAD HAND 116 (2007) (“[D]ynasty trusts have negative effects both for their living beneficiaries and for American society.”); RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 82 (2010) (“[D]ynasty trusts have the capacity to impose considerable societal harm.”); Mark L. Ascher, *But I Thought the Earth Belonged to the Living*, 89 TEX. L. REV. 1149, 1160–61 (2011) (stating that permitting “private trusts

Thus, this Article analyzes the justifications for restricting testamentary freedom. There are few attempts to analyze the issue systematically,<sup>27</sup> especially from a functional perspective.<sup>28</sup> This lack of functional analysis is surprising, given the potential benefits of applying economic insights to succession law.<sup>29</sup> Moreover, from recent books like *Immortality and the Law: The Rising Power of the American Dead* to articles such as *But I Thought the Earth Belonged to the Living*, a number of scholars have argued (with some force) that the legal system cedes too much control to the dead.<sup>30</sup> This Article contends that nearly the opposite may be true: while perpetual trusts and other forms of dead hand control can be problematic,<sup>31</sup> there is also a risk of disregarding donative intent and restricting testamentary freedom in ways that are socially detrimental and that harm donors as well as their potential donees.

Part I provides an overview of American succession law, including the principle of testamentary freedom, its economic justifications, and its legal limitations. Part II explains why the ex ante perspective is relevant for analyzing succession law and highlights a number of ex ante considerations that are often overlooked. Part III investigates justifications for restricting testamentary freedom: imperfect information, negative externalities, and

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to be perpetual is loony” and noting that “the only real beneficiaries will be the trustees and the lawyers”).

27. For a summary of some of the primary arguments for restricting the dead hand, see Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1257–64 (1985). For an earlier treatment, see SIMES, *supra* note 18.

28. For a concise analysis of economic arguments for and against dead hand control, see SHAVELL, *supra* note 10, at 68–72. See also Halbach, *supra* note 6, at 5–8 (outlining economic justifications for inheritance); Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 5–18 (1992) (discussing rationales for testamentary freedom as well as objections and qualifications). There is a vast literature on estate taxation, but my primary focus is on other limitations on testamentary freedom, and I discuss the issue of taxation only briefly. See *infra* notes 178–79, 184, 187, 254, 295–97 and accompanying text.

29. See Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855 (2012); cf. Adam J. Hirsch, *Freedom of Testation/Freedom of Contract*, 95 MINN. L. REV. 2180, 2253 (2011) (“[T]he field of wills remains underdeveloped theoretically [because s]cholars have rarely tilled its soil with the implements of interdisciplinary analysis . . .”). For an example incorporating the idea of agency costs into trust law, see Sitkoff, *supra* note 15. Sitkoff, as well as Max Schanzenbach and Jonathan Klick, have led the way in the economic analysis of trusts, including a number of important empirical studies. See, e.g., Jonathan Klick & Robert H. Sitkoff, *Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey’s Kiss-Off*, 108 COLUM. L. REV. 749 (2008); Max M. Schanzenbach & Robert H. Sitkoff, *Did Reform of Prudent Trust Investment Laws Change Trust Portfolio Allocation?*, 50 J.L. & ECON. 681 (2007).

30. See, e.g., MADOFF, *supra* note 26, at 154 (discussing the “rising power of the American dead” and arguing that “deference to the wishes of the dead imposes significant costs on living individuals and threatens our most fundamental societal values”); Ascher, *supra* note 26, at 1149 (maintaining that “certain trends in the law of the dead have threatened to put us sharply at odds with Jefferson’s vision” that “the earth belongs . . . to the living”).

31. For an argument for limiting the dead hand in the context of perpetual trusts and the RAP, see RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS ch. 27 introductory note (2011).



intergenerational equity. I contend that, while these justifications can be consistent with increasing social welfare, disregarding donative intent to maximize the donees' ex post interests is undesirable. Part IV analyzes legal restrictions on testamentary freedom and evaluates the extent to which these restrictions are consistent with the economic justifications.

## I. STRUCTURE OF AMERICAN SUCCESSION LAW

Understanding American succession law requires an understanding of its organizing principle, testamentary freedom. The freedom of disposition is central in the law of wills as well as trusts. After discussing the role of testamentary freedom in succession law (Part I.A), I outline several of the primary economic justifications for testamentary freedom (Part I.B) and examine the current legal restrictions on testamentary freedom (Part I.C).

### A. *The Organizing Principle: Testamentary Freedom*

It may well be that “the institution of inheritance is universal,”<sup>32</sup> but, historically, legal systems diverge on the institutional mechanisms for facilitating the intergenerational transfer of private property. Unlike laws that rely on primogeniture,<sup>33</sup> require equal division,<sup>34</sup> or attempt to abolish inheritance,<sup>35</sup> the “organizing principle” of American succession law is the “freedom of disposition” or *testamentary freedom*.<sup>36</sup> Testamentary freedom is “the idea that a person has the right to choose who will succeed to things of value left behind at death.”<sup>37</sup> Freedom of testation is “a characteristically

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32. Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1369 n.270 (1993) (citing PIERRE L. VAN DEN BERGHE, *HUMAN FAMILY SYSTEMS* 89 (1979)); see also Halbach, *supra* note 6, at 4 (“[S]ome form of inheritance is virtually a universal institution of ancient and modern societies.”).

33. See ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 382–83 (R.H. Campbell & A.S. Skinner eds., Clarendon Press 1976) (1776) (explaining primogeniture’s origins in medieval Europe).

34. See JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* 1038 (Batoche Books 2001) (1848) (opining that equal division laws are “very seriously objectionable”).

35. See Karl Marx & Friedrich Engels, *The Communist Manifesto*, in KARL MARX: *SELECTED WRITINGS* 221, 237 (David McLellan ed., Oxford Univ. Press 1977) (1848) (advocating “[a]bolition of all right of inheritance”); see also Frances Foster-Simons, *The Development of Inheritance Law in the Soviet Union and the People’s Republic of China*, 33 AM. J. COMP. L. 33, 36–37 (1985) (discussing how the U.S.S.R. “began the process of institutionalizing inheritance” in 1922, only four years after “the Soviet regime officially abolished the right”).

36. RESTATEMENT (THIRD) OF PROP.: *WILLS AND OTHER DONATIVE TRANSFERS* § 10.1 cmt. a (2003); see also Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. (forthcoming 2014) (“The organizing principle of the American law of succession, both probate and nonprobate, is *freedom of disposition*.”).

37. Lawrence M. Friedman, *The Law of Succession in Social Perspective*, in *DEATH, TAXES AND FAMILY PROPERTY*, *supra* note 6, at 9, 12. Testamentary freedom, i.e., a donor’s right to select beneficiaries is technically distinct from the freedom of inheritance, i.e., a donee’s right to receive property or donor’s right to avoid confiscation. See Hirsch & Wang, *supra* note 28, at 6 n.16; see also ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 168 (1974) (distinguishing between the “right to inherit” and the “right to bequeath”).

modern idea—it was and is rare in simpler societies; but it is a leading principle in the United States and most western countries.”<sup>38</sup>

While different countries have embraced different conceptions of testamentary freedom,<sup>39</sup> succession law in the United States gives donors a “nearly unrestricted right to dispose of their property as they please.”<sup>40</sup> American succession law privileges “donor’s intention” as the “controlling consideration” in determining the meaning of a donative document.<sup>41</sup> As the *Restatement (Third) of Property: Wills and Other Donative Transfers* emphasizes, the “law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor’s decisions about how to allocate his or her property.”<sup>42</sup> The function of succession law is to “facilitate rather than regulate.”<sup>43</sup> Similarly, the *Uniform Probate Code* (UPC) provides that one of the Code’s “underlying purposes and policies” is “to discover and make effective the intent of a decedent in distribution of his property.”<sup>44</sup>

The idea of testamentary freedom is central not only in wills but also in trusts. Many courts emphasize that, just as the court’s role in interpreting a will is to facilitate a testator’s intent, the role of the court in construing a trust is to effectuate the settlor’s intent.<sup>45</sup> Historically, donative intent has been a “defining force in trust law—the ‘polestar’ which guided all aspects of trust administration.”<sup>46</sup> Thus, for both wills and trusts, the freedom of testation—“the dead hand’s right to decide how property will be handled after a person dies”—is the “basic principle” of succession law.<sup>47</sup>

38. Friedman, *supra* note 37, at 12.

39. See, e.g., JENS BECKERT, *INHERITED WEALTH* 21–82 (Thomas Dunlap trans., 2008) (comparing testamentary freedom in France, Germany, and the United States); Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 137–42 (2008) (discussing how the American approach to disinheritance of children “contrasts sharply with those of civil law and Commonwealth jurisdictions”).

40. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a.

41. *Id.* § 10.1 (“[A] donor’s intention is given effect to the maximum extent allowed by law.”).

42. *Id.* § 10.1 cmt. c.

43. *Id.*

44. UNIF. PROBATE CODE § 1-102(b)(2), 8 U.L.A. pt. I, at 26 (2010); see also *id.* art. II prefatory note, 8 U.L.A. pt. I, at 75 (noting a “decline of formalism in favor of intent-serving policies”); John H. Langbein & Lawrence W. Waggoner, *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALB. L. REV. 871, 874–75 (1992).

45. See, e.g., *In re Estate of Feinberg*, 919 N.E.2d 888, 896 (Ill. 2009) (emphasizing a “public policy favoring testamentary freedom”); *Thorson v. Neb. Dep’t of Health & Human Servs.*, 740 N.W.2d 27, 33 (Neb. 2007) (concluding that the “primary rule” is that “a court must, if possible, ascertain the intention of the testator or creator”); *In re Lowy*, 931 A.2d 552, 556 (N.H. 2007) (pointing out that the settlor’s intention is “paramount”).

46. Jeffrey A. Cooper, *Empty Promises: Settlor’s Intent, the Uniform Trust Code, and the Future of Trust Investment Law*, 88 B.U. L. REV. 1165, 1171 (2008) (citing *In re Sherman Trust*, 179 N.W. 109, 112 (Iowa 1920) (citing *Wilberding v. Miller*, 106 N.E. 665, 667 (Ohio 1913))); see also *Bryan v. Dethlefs*, 959 So. 2d 314, 317 (Fla. Dist. Ct. App. 2007) (“The polestar of trust or will interpretation is the settlor’s intent.”).

47. FRIEDMAN, *supra* note 1, at 19; see also Paula A. Monopoli, *Toward Equality: Nonmarital Children and the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 995, 1010 n.94 (2012) (“Freedom of testation and testator’s intent are frequently identified as

*B. Economic Justifications for Testamentary Freedom*

Most scholars today emphasize a view of testamentary freedom that is rooted in positive law and justified by functional considerations.<sup>48</sup> This functional perspective emphasizes the “social welfare” of the parties and seeks to determine how the law can create the best incentives for the donor, donees, and other parties that a donor’s disposition of property may affect.<sup>49</sup> Under this economic or functional approach, there are several justifications for privileging testamentary freedom.<sup>50</sup>

First, the freedom of testation maximizes donor satisfaction. As Edward Halbach puts it,

[A] society should be concerned with the total amount of happiness it can offer, and to many of its members it is a great comfort and satisfaction to know during life that, even after death, those whom one cares about can be provided for and may be able to enjoy better lives because of the inheritance that can be left to them.<sup>51</sup>

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paramount jurisprudential touchstones in the area of trusts and estates.”); Sitkoff, *supra* note 36; cf. Klick & Sitkoff, *supra* note 29, at 824 (noting that, even in charitable trusts, the “presumption should be in favor of the donor’s intent”).

48. See Pamela R. Champine, *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 NEB. L. REV. 387, 432 (2001) (characterizing “[the] view which posits that testamentary freedom . . . is a privilege offered for the purpose of motivating socially desirable behavior” as the “most prevalent justification for testamentary freedom”). Early natural law writers like Hugo Grotius and John Locke argued a testator had the right to bequeath property to whomever he wished, subject to certain obligations to dependents. See 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* [ON THE LAW OF WAR AND PEACE: THREE BOOKS] 265 (Francis W. Kelsey trans., Clarendon Press 1925) (1625); JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 65, at 36 (C.B. Macpherson ed., Hackett Pub. Co. 1980) (1690) (“[A] father may dispose of his own possessions as he pleases, when his children are out of danger of perishing for want . . .”). But several natural law scholars, including William Blackstone and Samuel Pufendorf, criticized using the natural law as the basis for testamentary freedom. See 2 WILLIAM BLACKSTONE, *COMMENTARIES* \*10–11; 2 SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* [ON THE LAW OF NATURE AND OF NATIONS: EIGHT BOOKS] 615–20 (C.H. Oldfather & W.A. Oldfather trans., Clarendon Press 1934) (1688); see also BECKERT, *supra* note 39, at 51 (discussing Pufendorf); Hirsch & Wang, *supra* note 28, at 7 (discussing Blackstone).

49. Halbach, *supra* note 6, at 5–6; Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 51 (1999); Hirsch & Wang, *supra* note 28, at 6–14. In this Article, I adopt most of the assumptions of welfare economics, including the idea that donors and donees are rational and forward looking and that interpersonal utility comparisons are feasible. See SHAVELL, *supra* note 10, at 595–98. Welfare economics does not exclude other considerations, such as the autonomy of the donor or fairness to the donees, as long as these considerations are not given independent weight. For simplicity, I bracket several questions in social choice theory about aggregating individual preferences into a social welfare function. For early contributions to this literature, see generally KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963); WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* (1982).

50. See Halbach, *supra* note 6, at 5 (discussing rationales for testamentary freedom); Hirsch & Wang, *supra* note 28, at 6–14 (same).

51. Halbach, *supra* note 6, at 5; see also Hirsch & Wang, *supra* note 28, at 8 (“Bracton’s assumption—shared by modern social scientists—was that persons derive satisfaction out of bequeathing property to others.”).

Steven Shavell points out that “bequeathing property is simply one way of using property.”<sup>52</sup> Consequently, interfering with bequests “tends to reduce individuals’ utility” because “a person will derive less utility from property if he wants to bequeath it but is prevented from doing so.”<sup>53</sup> To the extent that a donor’s private interests may converge with what is socially optimal, the donor will have an incentive to promote social welfare.

Second, testamentary freedom promotes capital accumulation. Shavell notes that “a person will not work as hard to accumulate property if he cannot then bequeath it as he pleases.”<sup>54</sup> Likewise, other commentators suggest that the freedom of testation may be an “incentive to industry and saving,”<sup>55</sup> “encouragement to industry and thrift,”<sup>56</sup> and “incentive for productive activities.”<sup>57</sup> Thus, if a donor may dispose of property at death, the donor’s incentive to work, save, and invest converges with the optimal result. By contrast, if a donor prefers to give property to another but instead decides to consume the property, a reduction in savings will affect not only the donor’s utility but also society’s savings and its capital base. For this reason, Gordon Tullock contends that the “principal” argument for inheritance is “conservation of capital.”<sup>58</sup>

Third, compared to legislatures or courts, donors may possess better information about the circumstances of family members and other donees.<sup>59</sup> This informational advantage may allow donors to select the highest-valued donee (e.g., a gifted or disabled child).<sup>60</sup> By contrast, legislatures must rely on general rules governing the succession of property (e.g., the first child inherits everything or each child receives an equal share), which can be overinclusive, underinclusive, or both. Typically, courts have neither the

52. SHAVELL, *supra* note 10, at 65.

53. *Id.*; see also Gordon Tullock, *Inheritance Justified*, 14 J.L. & ECON. 465, 474 (1971) (“Individuals before their death would be injured if they are prohibited from passing on their estate to their heirs because it eliminates one possible alternative which they might otherwise choose.”).

54. SHAVELL, *supra* note 10, at 65.

55. Hirsch & Wang, *supra* note 28, at 8.

56. Halbach, *supra* note 6, at 4.

57. Jeffrey E. Stake, *Darwin, Donations, and the Illusion of Dead Hand Control*, 64 TUL. L. REV. 705, 749 (1990); see also Robert C. Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 WASH. U. L.Q. 723, 735–63 (1986).

58. Tullock, *supra* note 53, at 465.

59. See Hirsch & Wang, *supra* note 28, at 12 (arguing that testamentary freedom “permits more intelligent estate planning,” by allowing the testator to “take account of the differing needs’ of members of her family” (quoting WILLIAM M. MCGOVERN, JR. ET AL., *WILLS, TRUSTS AND ESTATES* § 3.8, at 88–89 (1988))). *But cf.* Stake, *supra* note 57, at 730 (arguing that “donations are not necessarily tailored to achieve an optimal distribution of rights” because “the donor’s intended distribution will maximize the benefit to the donor’s genes”).

60. See C.Y. Cyrus Chu, *Primogeniture*, 99 J. POLIT. ECON. 78, 79 (1991) (“Unequal bequests may occur when parents intend to *compensate* a less able child or to *reinforce* the advantage of one with greater ability.”); *cf.* 2 BLACKSTONE, *supra* note 48, at \*12 (noting that restrictions on freedom of disposition “prevented many provident fathers from dividing or charging their estates as the exigence of their families required”).

time nor the institutional capacity to investigate the circumstances of each decedent to determine the optimal distribution.<sup>61</sup>

Fourth, freedom of testation may strengthen family relationships. Adam Hirsch and William Wang argue that this freedom “supports . . . a market for the provision of social services” and “encourages . . . beneficiaries to provide . . . care and comfort—services that add to the total economic ‘pie.’”<sup>62</sup> In addition, while altruism or love undoubtedly motivates many gifts within families, there is also the possibility of “strategic bequests.”<sup>63</sup> Some parents may use the threat of disinheritance to control the behavior of their children, for example, by inducing their children to provide greater care for them as they grow older.<sup>64</sup> How often this threat of disinheritance affects the parties’ incentives is an empirical question. While there is some evidence to suggest that the threat of disinheritance may be relevant for certain donors,<sup>65</sup> there are also good reasons to be skeptical about this rationale.<sup>66</sup> Nevertheless, testamentary freedom may provide parents with greater control over their children and encourage children to care for their parents.

Overall, effectuating a donor’s ex ante interests is often consistent with maximizing social welfare.<sup>67</sup> The law usually facilitates donative intent, as

61. See Pierre Pestieau, *Gifts, Wills and Inheritance Law*, in 6 ENCYCLOPEDIA OF LAW AND ECONOMICS 96, 100 (Boudewijn Bouckaert & Gerrit De Geest eds., 2011) (“This relative superiority of the parents is often viewed as a key argument against any public interference with private intergenerational transfers.”). *But cf.* Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77, 124 (1998) (“China’s behavior-based model of inheritance presents . . . a workable inheritance scheme of individualized justice that emphasizes judicial discretion rather than fixed rules.”); Paula A. Monopoli, “Deadbeat Dads”: *Should Support and Inheritance Be Linked?*, 49 U. MIAMI L. REV. 257, 297 (1994) (“American inheritance law has been relatively less concerned with ‘fair’ reallocation of property at death because of its embrace of extensive freedom of testation and minimal forced heirship.”).

62. Hirsch & Wang, *supra* note 28, at 9–10; see also Gabrielle A. Brenner, *Why Did Inheritance Laws Change?*, 5 INT’L REV. L. & ECON. 91 (1985).

63. See, e.g., B. Douglas Bernheim et al., *The Strategic Bequest Motive*, 93 J. POL. ECON. 1045 (1985); Tate, *supra* note 39.

64. SHAVELL, *supra* note 10, at 63 (discussing the control of children via conditional inheritance); see also Pestieau, *supra* note 61, at 109 (noting that several papers conclude that “the only way to induce children to perform and not to shirk responsibility while waiting for an inheritance is to allow their parents the possibility of disinheriting them”).

65. See Brenner, *supra* note 62, at 100 (discussing how preventing fathers from leaving a will “started to work *against* fathers, who could no longer compel either support or obedience from their children by the threat of disinheriting them”); Hirsch, *supra* note 29, at 2234 n.209 (citing other historical examples).

66. See, e.g., SHAVELL, *supra* note 10, at 63 (“A problem with this argument . . . is that if a parent desires attention, it is not obvious why the parent cannot ‘purchase’ it through gifts during the parent’s lifetime (such as through large holiday presents or loans for the education of grandchildren.)”); Hirsch & Wang, *supra* note 28, at 11 (“[T]he strongest argument against this rationale may be the practical observation that supplies of social services appear generally to be inelastic; they are forthcoming, in poor families as in rich, more or less irrespective of the suppliers’ inheritance prospects.”).

67. Maximizing social welfare is often the same as effectuating the donor’s interests, but not always. For example, assume a dying mother will give \$1,000 to her son and slightly prefers that the son use the money to attend the opera rather than as he pleases. The son has no interest in the opera and would obtain much greater utility if he can use the money to

expressed in a donative document like a will or trust, because it serves as a useful approximation of a donor's preferences.<sup>68</sup> Just as the law views an owner's use of property as evidence of its highest-value use, the law privileges donor intent as evidence of what maximizes the donor's utility. By aggregating each donor's preferences and "protecting the donor's right to maximize her own utility, as reflected in her attempt to dispose of her property by gift,"<sup>69</sup> the law may increase social welfare if the interests of donors generally converge with what is socially optimal.

Thus, whether testamentary freedom is consistent with maximizing social welfare depends on whether donors act in ways that are consistent with their own interests and the interest of donees. If "in most cases the public interest and the donor's intent are compatible,"<sup>70</sup> then the objective of promoting social welfare may justify adoption of testamentary freedom as the organizing principle of succession law.<sup>71</sup>

### C. Legal Restrictions on Testamentary Freedom

As discussed above, the organizing principle of American succession law is testamentary freedom.<sup>72</sup> Effectuating a donor's ex ante interests is not necessarily equivalent to maximizing social welfare. Accordingly, as the *Restatement (Third) of Property: Wills and Other Donative Transfers* points out, "American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose *that is prohibited or restricted by an overriding rule of law.*"<sup>73</sup> But what types of dispositions and purposes does the law prohibit or restrict?

The *Restatement (Third) of Property* provides a nonexhaustive list of situations in which the law curtails testamentary freedom:

Among the rules of law that prohibit or restrict freedom of disposition in certain instances are those relating to spousal rights; creditors' rights;

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purchase a big screen television. Here, requiring the son to attend the opera as a condition of the gift might decrease social welfare, even though doing so might be consistent with the donor's intent.

68. See SHAVELL, *supra* note 10, at 65; see also Terry W. Frasier, *Protecting Ecological Integrity Within the Balancing Function of Property Law*, 28 ENVTL. L. 53, 88 (1998) ("We try to honor the donor's intent, because the donor's intent is the clue to what gave the donor the greatest utility from disposing of her property.").

69. Frasier, *supra* note 68, at 88.

70. Craig Kauffman, *Sympathy for the Devil's Advocate: Assisting the Attorney General When Charitable Matters Reach the Courtroom*, 40 REAL PROP. PROB. & TR. J. 705, 707 (2006).

71. Whether testamentary freedom is the optimal system of allocating property at death is beyond the scope of this Article. Elsewhere, I analyze the advantages and disadvantages of testamentary freedom and compare it with alternative systems of succession, including forced heirship, family maintenance, and redistribution. See Daniel B. Kelly, *Allocating Property at Death: A Comparative Institutional Analysis of Succession Law* (Nov. 4, 2013) (unpublished manuscript) (on file with author); cf. Halbach, *supra* note 6, at 5 (discussing the possibility that inheritance is the "least objectionable arrangement for dealing with property on the owner's death").

72. See *supra* Part I.A.

73. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (2003) (emphasis added).

unreasonable restraints on alienation or marriage; provisions promoting separation or divorce; impermissible racial or other categoric restrictions; provisions encouraging illegal activity; and the rules against perpetuities and accumulations.<sup>74</sup>

In each of these situations, there is, ostensibly, a countervailing policy for not effectuating the donor's ex ante wishes.<sup>75</sup> Similarly, the UPC qualifies the freedom of testation in several situations, including the elective share for surviving spouses,<sup>76</sup> rule against perpetuities,<sup>77</sup> and rights of creditors.<sup>78</sup>

Just as a testator's intent is the controlling consideration in interpreting a will, the settlor's intent is "paramount" in construing a trust.<sup>79</sup> But, once again, the law curtails a donor's freedom of disposition because the settlor's intention must yield to countervailing policy considerations under certain circumstances. For example, section 404 of the *Uniform Trust Code* (UTC) states: "A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries."<sup>80</sup> This UTC provision imposes two requirements on the settler.

First, a trust must be lawful, not contrary to public policy, and feasible. These are longstanding limitations on the settlor's testamentary freedom of disposition. Historically, courts invalidated trust provisions that were designed to evade taxes, violate banking laws, pay bribes, defraud creditors, interfere with family relationships, encourage divorce, and restrict freedom of religion.<sup>81</sup> The UTC clarifies that a trust has an illegal purpose if "(1) its performance involves the commission of a criminal or tortious act by the trustee; (2) the settlor's purpose in creating the trust was to defraud creditors or others; or (3) the consideration for the creation of the trust was illegal."<sup>82</sup> In addition, a trust violates "public policy" if it tends to "encourage criminal or tortious conduct," "interfere with freedom to marry or encourage divorce," "limit religious freedom," or if its purpose is "frivolous or capricious."<sup>83</sup>

Second, under UTC section 404, "[a] trust and its terms must be for the benefit of its beneficiaries."<sup>84</sup> The comments to the UTC state, "The general purpose of trusts having identifiable beneficiaries is to benefit those beneficiaries in accordance with their interests as defined in the trust's

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74. *Id.*

75. *See infra* Part IV.

76. UNIF. PROBATE CODE §§ 2-201 to -207, 8 U.L.A. pt. I, at 101-21 (2010).

77. *Id.* §§ 2-901 to -902, 8 U.L.A. pt. I, at 465-66.

78. *Id.* §§ 3-801 to -816, 8 U.L.A. pt. II, at 208-66.

79. *In re Lowy*, 931 A.2d 552, 556 (N.H. 2007).

80. UNIF. TRUST CODE § 404, 7C U.L.A. 484 (2010); *see also* Cooper, *supra* note 46, at 1171 (noting that exceptions to the rule privileging a settlor's intent were "few and far between, limited to cases where a trust provision encouraged illegal activity, fostered immorality, or otherwise violated public policy").

81. *See* Cooper, *supra* note 46, at 1171 nn.21-23.

82. UNIF. TRUST CODE § 404 cmt., 7C U.L.A. at 484.

83. *Id.*, 7C U.L.A. at 485.

84. *Id.* § 404, 7C U.L.A. at 484.

terms.”<sup>85</sup> In reflecting on several recent developments in trust law, Edward Halbach points out that one theme is the “flexibility and efficiency in the pursuit of the best interests of trust beneficiaries within the settlor’s legally permissible objectives.”<sup>86</sup> Notably, the UTC and Halbach both cabin the benefit-of-the-beneficiaries principle within the principle that trustees must act in accordance with the settlor’s instructions, a normative claim that Robert Sitkoff defends in developing an agency costs theory of trust law.<sup>87</sup>

In addition, the idea that a trust must be for the benefit of beneficiaries has been a key issue in recent law reform proposals. For example, in advocating for more flexibility for trustees in performing their fiduciary duties, John Langbein suggests replacing the trust rule requiring trustees to act in the “sole interest” of beneficiaries with the standard for fiduciaries in corporate law, which would require trustees to act in the “best interests” of beneficiaries.<sup>88</sup> Furthermore, while a trust must benefit the beneficiaries, there is uncertainty about whether a settlor’s instructions can bind a trustee to act in a way that may be contrary to the beneficiaries’ own interests.<sup>89</sup> For example, if a trust contains a mandatory instruction to retain undiversified assets,<sup>90</sup> does a trustee have a duty to diversify, given that diversification is seemingly in the best interests of the beneficiaries?<sup>91</sup>

Below, I assess the extent to which a number of legal restrictions on testamentary freedom correspond with the economic justifications for restricting the freedom of testation.<sup>92</sup> Yet, before doing so, I examine why the ex ante perspective is relevant in succession law in Part II, and analyze the underlying justifications for restricting testamentary freedom in Part III.

## II. RELEVANCE OF THE EX ANTE PERSPECTIVE

The distinction between ex ante and ex post analysis, though widely utilized in other contexts, has received little attention in succession law. A handful of scholars mention situations in which ex ante analysis might be

85. *Id.* § 404 cmt., 7C U.L.A. at 485.

86. Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century’s End*, 88 CALIF. L. REV. 1877, 1881 (2000).

87. See Sitkoff, *supra* note 15, at 683 (“[L]aw should minimize the agency costs inherent in locating managerial authority with the trustee and the residual claim with the beneficiaries, but only to the extent that doing so is consistent with the ex ante instructions of the settlor.” (emphasis added)).

88. See Langbein, *supra* note 11.

89. Compare Cooper, *supra* note 46, at 1170, with Langbein, *supra* note 18, at 1112.

90. See JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 643–46 (9th ed. 2013) (discussing permissive versus mandatory retention of inception assets and a trustee’s duty to diversify).

91. In an influential article on mandatory rules in trust law, Langbein contends that “the courts will come to view the advantages of diversification as so overwhelming that the settlor’s interference with effective diversification will be treated as inconsistent with the requirement that the trust terms must be for the benefit of the beneficiaries.” Langbein, *supra* note 18, at 1115 (“Settlor-directed underdiversification is an avoidable harm, akin to the harm that the courts have prevented by intervening against settlors’ directions to waste or destroy trust property.”).

92. See *infra* Part IV.



pertinent for probate and trust law.<sup>93</sup> But there is no systematic account of why the *ex ante/ex post* distinction is significant or why these competing modes of analysis are useful in evaluating the justifications for restricting testamentary freedom. In this Part, I analyze the *ex ante/ex post* distinction, illustrate its practical importance with an example from trust investment law, and highlight several *ex ante* considerations that are often overlooked.

#### A. The *Ex Ante/Ex Post* Distinction

The *ex ante/ex post* distinction is an important concept in evaluating human behavior and the consequences of actions.<sup>94</sup> The distinction, coined by Gunnar Myrdal, a Swedish economist and sociologist, is used widely in macroeconomics “to distinguish what is planned (i.e., *ex ante*) from what actually happens (i.e., *ex post*).”<sup>95</sup> The distinction is also fundamental in analyzing legal rules and institutions.<sup>96</sup> Legal theorist Lawrence Solum has stated, “If I had to select only one theoretical tool for a first-year law student to master, it would be the *ex post/ex ante* distinction.”<sup>97</sup>

Why is the *ex ante/ex post* distinction relevant? *Ex post* analysis looks at an event or dispute after the fact.<sup>98</sup> Solum explains it this way: “The *ex post* perspective is backward looking. From the *ex post* point of view, we ask questions like: Who acted badly and who acted well? Whose rights were violated?”<sup>99</sup> By contrast, *ex ante* analysis looks at an event or dispute before the fact. We might ask: “What [e]ffect will this rule have on the future? Will deci[ding] . . . a case in this way produce good or bad consequences?”<sup>100</sup> Thus, “[e]x post analysis tends to focus on fairness and distributional concerns, whereas *ex ante* analysis is more likely to consider incentives for future conduct.”<sup>101</sup>

93. See *infra* notes 140–46 and accompanying text.

94. In a recent article, I argue that a number of insights from economics and economic analysis of law, including the *ex ante/ex post* distinction, are useful in analyzing succession law. See Kelly, *supra* note 29, at 867–71. This section expands on that earlier analysis of the *ex ante* perspective.

95. DONALD RUTHERFORD, *ROUTLEDGE DICTIONARY OF ECONOMICS* 210 (2d ed. 2002) (*ex ante, ex post* entry).

96. See THOMAS W. MERRILL & HENRY S. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 60 (2d ed. 2012) (noting that “[e]conomists often speak of ‘*ex ante*’ analysis and ‘*ex post*’ analysis” and pointing out that “this locution has been picked up by courts in recent years”).

97. Lawrence B. Solum, *Legal Theory Lexicon 001: Ex Ante & Ex Post*, *LEGAL THEORY LEXICON*, [http://lsolum.typepad.com/legal\\_theory\\_lexicon/2003/09/legal\\_theory\\_le\\_2.html](http://lsolum.typepad.com/legal_theory_lexicon/2003/09/legal_theory_le_2.html) (last updated Feb. 17, 2013); see also Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 *WASH. U. L.Q.* 1, 70 (1995) (“The policy analyst must always bear in mind that legal rules have *ex ante* consequences: they affect the world both after and before the fact.” (citing Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 *HARV. L. REV.* 4, 10–12, 19–33 (1984))).

98. MERRILL & SMITH, *supra* note 96, at 60; see also Kelly, *supra* note 29, at 867 (noting that the *ex post* view “attempts to arrive at an outcome or disposition which seeks to promote fairness, vindicate rights, or maximize social welfare based on prior events”).

99. Solum, *supra* note 97.

100. *Id.*

101. MERRILL & SMITH, *supra* note 96, at 64; see also Kelly, *supra* note 29, at 868 (noting that the *ex ante* perspective “recognizes that the selection of a legal rule can often have an effect on a party’s incentives”).

Most economically oriented legal scholars conclude that the ex ante perspective is a superior mode of legal and policy analysis. Louis Kaplow and Steven Shavell contend that “relying on an ex post view, when it differs from the ex ante perspective, always entails favoring a legal policy under which everyone is worse off ex ante.”<sup>102</sup> That is, if policy *A* is socially optimal ex ante, and policy *B* is socially optimal ex post, moving from *A* to *B* is undesirable (and makes everyone worse off); conversely, moving from *B* to *A* is socially desirable (and makes everyone better off). The ex ante view has at least two distinct advantages.

First, ex ante analysis incorporates the idea that “the choice of legal rules may affect how individuals behave at the outset, which often has an important influence on individuals’ well-being.”<sup>103</sup> The claim is not that law will always affect the actions of the parties. In certain circumstances, parties may take the same actions, irrespective of the applicable legal rule, due to underlying social norms or moral considerations.<sup>104</sup> Rather, the claim is that, in many situations, parties may change their behavior based on the law. Consider, for example, the time and money many individuals spend consulting lawyers and financial advisors to update their estate plans in response to changes in the tax code.<sup>105</sup> By contrast, “when one adopts an ex post perspective, one often ignores important effects of legal rules.”<sup>106</sup>

Second, ex ante analysis avoids the possibility of “hindsight bias.”<sup>107</sup> Hindsight bias, known colloquially as “Monday morning

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102. LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 439 (2002); see also POSNER, *supra* note 19, at 9 (“This discussion of sunk costs should help explain the emphasis that economists place on the ex ante (before the fact) rather than ex post (after the fact) perspective.”). Maximizing social welfare requires an ex ante view (which implicitly incorporates ex post considerations).

103. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 1158, 1356 (2001).

104. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 52–53 (1991) (finding that, in cattle disputes in Shasta County, California, allegiance to an “overarching norm of cooperation” is “wholly independent of formal legal entitlements”).

105. See, e.g., Jeffrey A. Cooper, *Ghosts of 1932: The Lost History of Estate and Gift Taxation*, 9 FLA. TAX REV. 875, 902 (2010); Carolyn Burgess Featheringill, *Estate Tax Apportionment and Nonprobate Assets: Picking the Right Pocket*, 21 CUMB. L. REV. 1, 42 (1990).

106. Kaplow & Shavell, *supra* note 103, at 1356. The point is not only that law may affect how individuals behave but that changes in how parties behave may affect their well-being. If a change in the tax code causes a client to adopt Estate Planning Strategy 2, rather than Estate Planning Strategy 1, it is not simply a matter of a client telling her attorney to draft a different provision in her will. Instead, all else equal, without the legal change, the donor may prefer Estate Planning Strategy 1. If a client adopts Estate Planning Strategy 2 because of some exogenous legal change, then switching from Strategy 1 to Strategy 2 reduces the client’s satisfaction. Thus, the substantive content of legal rules may alter how individuals act at the outset, which in turn may affect their happiness.

107. On hindsight bias, see, for example, Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 288 (1975), and Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 19 L. & HUM. BEHAV. 89 (1995).

quarterbacking,”<sup>108</sup> is a tendency of humans to “overestimate the predictability of past events—both overstating their ability to have predicted past events and believing others should have been able to predict these events.”<sup>109</sup> Ex ante analysis attempts to avoid hindsight bias by considering “all possible outcomes an individual might experience” rather than merely a salient, perhaps atypical, outcome that happens to occur.<sup>110</sup> As Kaplow and Shavell emphasize, comprehensively evaluating a legal rule “requires considering all possible outcomes an individual might experience, not just a particular one that may involve bad luck.”<sup>111</sup> Thus, a proper evaluation of a legal rule—that is, an evaluation that incorporates ex ante considerations, not just ex post concerns—“weights all possibilities by their probabilities precisely to avoid granting excessive weight to a particular subset of outcomes.”<sup>112</sup>

*B. Example: Hindsight Bias in Trust Investment Law*

To illustrate, consider a trustee’s fiduciary duty in trust investment law. A trustee owes a duty of prudence to the beneficiaries of a trust. Under this duty, trustees must act consistent with an objective standard of care.<sup>113</sup> Today, the primary application of this duty is in trust investment law: the trustee must invest assets with prudence. Over time the rule governing this duty has shifted from the “prudent man rule” to a “prudent investor rule.”<sup>114</sup> One problem with the prudent man rule was that courts allowed hindsight bias to affect their evaluation of a trustee’s performance.

Prior to the prudent man rule, most jurisdictions relied on “legal list” statutes.<sup>115</sup> These statutes restricted trustees to choosing certain “safe” investments like bonds and first mortgages.<sup>116</sup> Eventually, to replace such statutes and give trustees more flexibility, most states adopted the prudent man rule.<sup>117</sup> Under this rule, the trustee was “to make such investments and only such investments as a prudent man would make of his own property having in view the preservation of the estate and the amount and regularity of the income to be derived.”<sup>118</sup>

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108. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1457 (Philip Babcock Gove ed., 1993) (defining a “Monday morning quarterback” as “a person who using hindsight criticizes what others have done”).

109. Avishalom Tor, *The Methodology of the Behavioral Analysis of Law*, 4 HAIFA L. REV. 237, 253 (2008).

110. Kaplow & Shavell, *supra* note 103, at 1356.

111. *Id.*

112. *Id.*

113. See UNIF. TRUST CODE § 804, 7C U.L.A. 601 (2010) (“A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.”).

114. See RESTATEMENT (THIRD) OF TRUSTS ch. 17 introductory note (2007).

115. See John H. Langbein & Richard A. Posner, *Market Funds and Trust-Investment Law* (pt. 1), 1976 AM. B. FOUND. RES. J. 1, 3–4.

116. *Id.* at 4.

117. See RESTATEMENT (THIRD) OF TRUSTS ch. 17 introductory note.

118. See RESTATEMENT (SECOND) OF TRUSTS § 227 (1959).

But a major problem with the prudent man rule was hindsight bias. In applying the rule, courts often exhibited hindsight bias in evaluating the outcome of specific investments.<sup>119</sup> If a trustee selected a higher risk investment (e.g., securities), and the investment did not pay off, the trustee faced liability for “speculating” in the stock, even if the investment was a reasonable one at the time it was made. Thus, due to hindsight bias, courts had a proclivity to focus on the actual performance of an investment, without considering the likelihood of all possible outcomes.

A classic example of hindsight bias is *In re Chamberlain's Estate*.<sup>120</sup> The case involved trust investments made in August 1929, three months before the stock market crash in October 1929. In ruling against the trustees for failing to sell more quickly, the court opined: “It was common knowledge, not only amongst bankers and trust companies, but the general public as well, that the stock market condition [in August 1929] was an unhealthy one, that values were very much inflated, and that a crash was almost sure to occur.”<sup>121</sup> If it was in fact “common knowledge” that values were inflated, investors would have started to sell then, not three months later.<sup>122</sup> From the court’s perspective (after the fact), the stock market crash was inevitable. Yet, from an investor’s perspective (before the fact), the ex ante probability of a crash may have been relatively small. Thus, a decision not to sell in August 1929 was not necessarily an unreasonable one.

Social scientists have noted a proclivity among courts to exhibit hindsight bias in many situations, including the evaluation of investment decisions by trustees. For example, in analyzing the heuristics and biases of courts, Jeffrey Rachlinski notes that “courts judging the liability of trustees have not cleverly adapted to the hindsight bias, but have fallen prey to its influence.”<sup>123</sup> According to Rachlinski:

As a consequence of their reliance on hindsight, courts continuously declared investments of certain types to be speculative. Because of the hindsight bias, any investment with the potential to lose money could have given rise to liability; the riskier the investment, the more likely that it would result in liability. Consequently, the prudent-[man] rule evolved from a flexible standard of liability into a source of constraints on trustees developed by adjudication in hindsight.<sup>124</sup>

In testing whether hindsight bias affects judges, Chris Guthrie, Jeffrey Rachlinski, and Andrew Wistrich find that “judges exhibited a predictable hindsight bias.”<sup>125</sup> If judges “learned that a particular outcome had occurred, they were much more likely to identify that outcome as the most

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119. See DUKEMINIER & SITKOFF, *supra* note 90, at 619 (noting the “prevalence of hindsight bias in its application by courts”).

120. 156 A. 42, 43 (N.J. Prerog. Ct. 1931).

121. *Id.* at 43.

122. See DUKEMINIER & SITKOFF, *supra* note 90, at 619.

123. Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61, 79 (2000).

124. *Id.* at 80.

125. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 803 (2001).

likely to have occurred.”<sup>126</sup> In addition, Guthrie, Rachlinski, and Wistrich note several cases, including *Chamberlain*, in which trustees became “victims of the hindsight bias.”<sup>127</sup>

Not all courts succumb to judging by hindsight.<sup>128</sup> For example, in *Robison v. Elston Bank & Trust Co.*,<sup>129</sup> a case decided over seventy years ago, an Indiana intermediate appellate court emphasized that judges should evaluate a trustee’s exercise of due care “in the light of circumstances existing at the time the action was taken, and not in the light of subsequent events which could not be reasonably anticipated.”<sup>130</sup> The court pointed out that judging the trustee’s actions in hindsight could have perverse consequences: “For a trustee’s actions to be judged in the light of hindsight would discourage prudent men from undertaking any trust.”<sup>131</sup>

The problem with judging the trustees’ investments with the benefit of hindsight is not only the erroneous decisions themselves. Rather, these erroneous decisions can affect the parties’ incentives at the outset. Knowing they could be liable for “imprudent” investments, trustees learned not to engage in “risky” investments; instead, many trustees adopted investment strategies that were overly cautious relative to each beneficiary’s risk profile.<sup>132</sup> As a result, because investment strategies were too conservative, the prudent man rule actually harmed the beneficiaries. Even though a particular beneficiary may have succeeded in arguing that a trustee violated the duty of prudence because an investment turned out poorly in hindsight, the fact that trustees would have an incentive to choose investments with little risk meant smaller returns for future beneficiaries. Put another way, beneficiaries may have wanted the courts to evaluate investments with the benefit of hindsight after the fact, but these same beneficiaries would not want courts to judge by hindsight before the fact. Doing so would distort the incentives of the trustees and reduce the wealth of the beneficiaries. Despite the problem of hindsight bias and several other flaws, the prudent man rule persisted.<sup>133</sup>

Eventually, due to the influence of several articles by John Langbein and Judge Richard Posner,<sup>134</sup> trust investment law began to recognize the

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126. *Id.*

127. *Id.* at 804 (citing *First Ala. Bank of Montgomery v. Martin*, 425 So. 2d 415, 428 (Ala. 1982); *Chase v. Peaver*, 419 N.E.2d 1358, 1368 (Mass. 1981); *In re Chamberlain’s Estate*, 156 A. 42, 42–43 (N.J. Prerog. Ct. 1931)).

128. A number of courts avoided hindsight bias in concluding that a trustee’s actions should be evaluated at the time of a trustee’s decision. *See, e.g., Dennis v. R.I. Hosp. Trust Nat’l Bank*, 571 F. Supp. 623 (D.R.I. 1983); *In re Estate of Janes*, 681 N.E.2d 332 (N.Y. 1997).

129. 48 N.E.2d 181 (Ind. App. 1943).

130. *Id.* at 190.

131. *Id.*

132. *See* Rachlinski, *supra* note 123, at 81 (“[T]hese courts easily lapsed into the language of judging in hindsight, thereby driving other trustees into overly cautious investment strategies.”).

133. Jeffrey N. Gordon, *The Puzzling Persistence of the Constrained Prudent Man Rule*, 62 N.Y.U. L. REV. 52 (1987).

134. *See* Langbein & Posner, *supra* note 115; John H. Langbein & Richard A. Posner, *Market Funds and Trust-Investment Law: II*, 1977 AM. B. FOUND. RES. J. 1; John H.

problem of hindsight bias and incorporate insights from modern portfolio theory.<sup>135</sup> Accordingly, courts started to abandon the prudent man rule and adopt a new approach: the prudent investor rule.<sup>136</sup> The prudent investor rule explicitly warns against the dangers of hindsight bias. Specifically, the rule recognizes that the determination of whether a trustee has breached a duty of prudence depends on whether a trustee acts consistently with the duty *ex ante*, not whether the investments turned out poorly *ex post*.<sup>137</sup>

The prudent investor rule not only assists courts in deciding cases correctly but also helps ensure that a trustee's incentive to invest converges with the investments that would be in the best interests of the beneficiaries. Hence, reducing hindsight bias in judicial decisionmaking is beneficial for beneficiaries *ex ante*, even though particular beneficiaries will no longer be able to assert claims for breach of fiduciary duty in cases in which the trustee's investments turn out poorly *ex post*. To be sure, even under a prudent investor rule, some courts may continue to exhibit hindsight bias.<sup>138</sup> But the law's evolution from the prudent man rule to a prudent investor rule illustrates the importance of the *ex ante* perspective.

### C. Incorporating Ex Ante Considerations

In many areas of the law, legal policy can diverge from the socially optimal result because a legislature or court adopts an *ex post* perspective and ignores *ex ante* considerations. The law of succession is no exception. A handful of legal scholars, including Adam Hirsch,<sup>139</sup> John Langbein,<sup>140</sup>

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Langbein & Richard A. Posner, *The Revolution in Trust Investment Law*, 62 A.B.A. J. 764 (1976).

135. See HARRY M. MARKOWITZ, *PORTFOLIO SELECTION: EFFICIENT DIVERSIFICATION OF INVESTMENTS* (1959); Harry M. Markowitz, *Portfolio Selection*, 7 J. FIN. 77 (1952); see also Edwin J. Elton & Martin J. Gruber, *Modern Portfolio Theory, 1950 to Date*, 21 J. BANKING & FIN. 1743 (1997) (surveying the literature and history).

136. See, e.g., *Nelson v. First Nat'l Bank & Trust Co. of Williston*, 543 F.3d 432, 434–36 (8th Cir. 2008) (concluding that the trustee conformed with the prudent investor rule); *In re Estate of Cooper*, 913 P.2d 393, 395 (Wash. App. 1996) (“We hold the prudent investor rule focuses on the performance of the trustee, not the results of the trust.”).

137. UNIF. PRUDENT INVESTOR ACT § 8, 7B U.L.A. 38 (2006) (“Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee’s decision or action and not by hindsight.”); RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. b (2007) (“[C]ompliance with these fiduciary standards is to be judged as of the time the investment decision in question was made, not with the benefit of hindsight or by taking account of developments that occurred after the time of a decision to make, retain, or sell an investment.”).

138. See Guthrie et al., *supra* note 125, at 821 (“[J]udges applying the prudent-investor rule to cases of trustee liability seem also to have fallen prey to the hindsight bias.”).

139. See, e.g., Hirsch, *supra* note 49, at 70–71, 82 (spendthrift trusts); Adam J. Hirsch, *Fear Not the Asset Protection Trust*, 27 CARDOZO L. REV. 2685, 2695–96 (2006) (asset protection trusts); Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1066, 1123, 1127 n.213 (1996) (executing, reforming, updating wills); Adam J. Hirsch, *Revisions in Need of Revising: The Uniform Disclaimer of Property Interests Act*, 29 FLA. ST. U. L. REV. 109, 146 (2001) (disclaimer); Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 615, 626 (2009) (capacity and impossibility).

140. See, e.g., Langbein, *supra* note 11, at 937, 972 (duty of loyalty).

Robert Sitkoff,<sup>141</sup> and Stewart Sterk,<sup>142</sup> mention situations in which ex ante analysis is relevant in probate or trust law.<sup>143</sup> Moreover, as discussed, Langbein and Posner helped to revolutionize trust investment law by emphasizing hindsight bias and other flaws with the prudent man rule.<sup>144</sup> But there are few attempts to analyze ex ante considerations in succession law more systematically.

This Article discusses a number of ex ante considerations that are relevant in succession law, including (1) the donor's happiness; (2) the donor's incentive to accumulate property; (3) the structure and timing of gifts; and (4) other ex ante considerations. These ex ante considerations, while often overlooked, are critical in accurately evaluating the normative justifications for restricting testamentary freedom.<sup>145</sup>

### 1. Donor's Happiness

A legal rule or judicial decision that interferes with a donor's disposition after death may affect the donor's happiness during life. Of course, after death, a donor does not suffer disutility. Thus, ex post, a legislature or court may ignore the effect of a rule or decision on the donor. However, overlooking the donor's happiness during life may result in adopting a legal rule that is socially undesirable.

The ex ante perspective incorporates the satisfaction of a donor—even if a donor is dead—not just the interests of the donees. Courts have long recognized the importance of the donor's happiness. For example, seventy-five years ago, the D.C. Circuit announced:

Perhaps the wishes of the dead should not concern the living, but our legal system is built on a different theory. Many living persons derive satisfaction from the thought that they can control the devolution of their property. In distributing decedents' estates the law undertakes, within

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141. See, e.g., Sitkoff, *supra* note 15, at 657–71 (trust modification and termination, trustee removal, settlor standing, trust protectors); Robert H. Sitkoff, *Trust Law, Corporate Law, and Capital Market Efficiency*, 28 J. CORP. L. 565, 577–78 (2003) (trust management).

142. Stewart E. Sterk, *Rethinking Trust Law Reform: How Prudent Is Modern Prudent Investor Doctrine?*, 95 CORNELL L. REV. 851, 889–91 (2010) (prudent investment).

143. For other examples, see David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1700–01 (2009) (testamentary freedom and unconscionability), and Peter T. Wendell, *The Evolution of the Law of Trustee's Powers and Third Party Liability for Participating in a Breach of Trust: An Economic Analysis*, 35 SETON HALL L. REV. 971, 1010–12 (2005) (duties of a trustee and liability of third parties).

144. See *supra* notes 134–37 and accompanying text.

145. Many ex ante considerations (e.g., the donor's happiness and donor's incentives) are relevant for evaluating restrictions on testamentary freedom only if the donor *knows* about the restriction. For purposes of this analysis, I assume that donors are aware of the law. This assumption is likely warranted for most donors, given the role of the estate planning attorney. If the donor (or the donor's attorney) was somehow unaware of the restriction or the risk of legal intervention (e.g., suppose that courts did not publish prior decisions restricting testamentary freedom), then it may be possible for the law to maximize the donees' interests ex post while not affecting the donor's utility or incentives ex ante, although this scenario is unlikely except in unusual circumstances. Cf. Stake, *supra* note 57, at 757 (discussing how the rule against perpetuities, due to its complexity, might avoid the conflict between generations because of a donor's "beneficial misapprehension" of the rule).

limits, to follow the wishes of the former owners as manifested by will or intestacy.<sup>146</sup>

Indeed, one of the primary justifications for testamentary freedom is that “owners gain personal satisfaction from bequeathing property.”<sup>147</sup>

Modern scholars in law and economics, as well as trusts and estates, agree that a donor’s satisfaction is relevant. As noted above, in analyzing whether society should intervene in private decisions to bequeath property, Shavell notes that interfering with bequests “tends to reduce individuals’ utility directly.”<sup>148</sup> That is, “a person will derive less utility from property if he wants to bequeath it but is prevented from doing so.”<sup>149</sup> Likewise, in discussing arguments for dead hand control, Shavell points out that controlling property after death is simply “a way of using property.”<sup>150</sup> Consequently, “a benchmark for thought is that society should not interfere with parties’ desires to control property long after their deaths.”<sup>151</sup> Similarly, a number of economically oriented scholars in wills, trusts, and estates have highlighted the importance of donor satisfaction, as well.<sup>152</sup>

A donor may derive happiness from giving because of self-interest or altruism. If the happiness is related to mere self-interest, a donor obtains satisfaction from the act of giving itself. James Andreoni describes this as “warm-glow giving” because the donor experiences a warm glow simply by making the gift.<sup>153</sup> The distinguishing characteristic of this type of self-interested giving is that the act of giving “may supply utility to the donor, independently of the degree of satisfaction it renders the donee.”<sup>154</sup> Other types of self-interested giving may be based on exchange or reciprocity.<sup>155</sup>

A gift also may increase the donor’s happiness due to altruism.<sup>156</sup> If a donor is altruistic, the donor’s utility is a function of the donees’ utility, i.e.,

146. *Webb v. Lohnes*, 96 F.2d 582, 584 (D.C. Cir. 1938).

147. Hirsch, *supra* note 49, at 51; *see also supra* Part I.B.

148. SHAVELL, *supra* note 10, at 65.

149. *Id.*

150. *Id.* at 68.

151. *Id.*

152. *See, e.g.*, Halbach, *supra* note 6, at 5 (“[I]t is a great comfort and satisfaction to know during life that, even after death, those whom one cares about can be provided for and may be able to enjoy better lives because of the inheritance that can be left to them.”); Hirsch & Wang, *supra* note 28, at 8 (“To the extent that lawmakers deny persons the opportunity to bequeath freely, the subjective value of property will drop, for one of its potential uses will have disappeared.”).

153. James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 *ECON. J.* 464, 464–77 (1990).

154. SHAVELL, *supra* note 10, at 58.

155. *See* Erik Schokkaert, *The Empirical Analysis of Transfer Motives*, in 1 *HANDBOOK OF THE ECONOMICS OF GIVING, ALTRUISM, AND RECIPROCITY* 127, 132–33, 166–68 (Serge-Christophe Kolm & Jean Mercier Ythier eds., 2006) (discussing reciprocity as a motivation for giving and comparing altruism with exchange or reciprocity).

156. *See, e.g.*, POSNER, *supra* note 19, at 688 (noting that one “explanation for bequests is the motive of altruism”). For an extended discussion of altruism in intergenerational transfers, *see* Barbara H. Fried, *Who Gets Utility from Bequests? The Distributive and Welfare Implications for a Consumption Tax*, 51 *STAN. L. REV.* 641 (1999).



the preferences of the donor incorporate the well-being of donees.<sup>157</sup> For example, parents may pay college tuition for a child because the parents' happiness depends on the child's happiness.<sup>158</sup> A grantor may execute a discretionary support trust to benefit a spouse because the grantor takes comfort knowing the spouse will have financial support after the grantor's death. A philanthropist may donate money to charity because she believes that advancing science, relieving poverty, or promoting public health will improve the welfare of others.

By contrast, the ex post perspective may ignore the donor's utility. If a donor is dead, a court may elevate the interests of donees, even if doing so harms the donor. Some courts and commentators may overlook the fact that disregarding a donor's intent after death may decrease the donor's happiness during life. One scholar characterizes the ex post view in this way: "Protecting the intent of a deceased testator over the interest of living individuals rarely fares well when viewed from an ex post perspective."<sup>159</sup> He asks, "What sense does it make for society to allow the wishes of the deceased to trump the happiness of the living?"<sup>160</sup> Another scholar puts it more bluntly: "I can't believe that reverence for some dead guy's intent is going to determine major outcomes."<sup>161</sup>

Adopting an ex post view that privileges the interests of donees over the wishes of donors is often based on an erroneous assumption. Specifically, this view assumes that restricting a donor's ability to transfer property at death will not affect a donor's utility during life. But such an assumption is warranted only if living donors continue to believe the law will effectuate their intent, even though courts regularly disregard the intent of similarly situated donors.<sup>162</sup> Shavell notes that "individuals who desire dead hand control will in fact suffer utility losses when they are alive, assuming that they anticipate that property will not be used in the way they want when they are dead."<sup>163</sup> Thus, courts will reach the correct result only if the law

157. See SHAVELL, *supra* note 10, at 58 (observing that a "major motivation" for gift giving is "pure altruism" in which a "donor cares about the well-being of the donee" and "obtains utility from the utility of the donee"); see also Steven Shavell, *An Economic Analysis of Altruism and Deferred Gifts*, 20 J. LEGAL STUD. 401, 402 (1991) (employing a model in which "the donor's utility includes a component equal to the donee's utility multiplied by a parameter called the donor's degree of altruism," and so "the donor's utility will be higher the greater his degree of altruism or the larger the donee's utility").

158. Cf. Chu, *supra* note 60, at 93 ("The model of altruism toward children usually assumes that the family head intends to maximize a *dynastic utility function*.").

159. Lee-ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 ALA. L. REV. 273, 288 (2010).

160. *Id.*

161. Dobris, *supra* note 13, at 2548–49.

162. Cf. Stake, *supra* note 57, at 757.

163. SHAVELL, *supra* note 10, at 68; cf. Paul H. Brietzke, *New Wrinkles in Law . . . and Economics*, 32 VAL. U. L. REV. 105, 121 n.42 (1997) (noting that, even though "Coasian bargains are impossible because the grantor is dead . . . the common law continues to respect the grantor's interests because . . . of the putative *ex ante* efficiency of allowing her to rule from beyond the grave" (citing UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* 174 (1997))); J.D. Trout & Shahid A. Buttar, *Resurrecting "Death Taxes": Inheritance, Redistribution, and the Science of Happiness*, 16 J.L. & POL. 765, 789–90 (2000) (arguing that one who is dead cannot have desires but acknowledging that "what will happen after one

views the problem *ex ante* and incorporates the donor's happiness during life.<sup>164</sup>

## 2. Donor's Incentive To Accumulate Property

A legal rule or decision that alters a donor's disposition after death also may affect the donor's incentive to accumulate property during life. For example, if a donor believes a court will not effectuate her intent, then the donor may have less incentive to work, less incentive to save and invest, and a greater incentive to consume property. The *ex ante* view incorporates the fact that the choice of legal rules may affect the incentive to accumulate property, including a donor's incentive to work, save, and invest.<sup>165</sup> By contrast, an *ex post* view may ignore that the choice of rules affects a donor's incentive to accumulate property. By ignoring such considerations, courts may distort behavior in several ways that are undesirable.

If a donor anticipates a restriction on testamentary freedom, the donor may have an incentive to work less during life. Bequeathing property is one way of using property, so altering gifts may lower the incentive to work: "[A] person will not work as hard to accumulate property if he cannot then bequeath it as he pleases."<sup>166</sup> This distortion in the incentive to work has social implications as well because "thwarted testators will choose to accumulate less property, and the total stock of wealth existing at any given time will shrink."<sup>167</sup> Thus, legal intervention in the decision to bequeath property may reduce the incentive of donors to work.

Likewise, if a testator thinks a court may disregard donative intent, the testator may save less and consume more. If a legal rule makes bequeathing

is dead is relevant to one's level of welfare" because, "[f]or example, one might be concerned that, without an inheritance, one's offspring would be left vulnerable, and this worry about the future of one's offspring may erode one's happiness").

164. To illustrate, consider an example. Suppose *D* gives \$100,000 to *C* in a testamentary trust for *C*'s college expenses. During life, the marginal utility to *D* of knowing that *C* will be able to access the money for college (rather than for some other purpose) is \$30,000. After *D* dies, *C* attempts to terminate the trust. Assume that the value to *C* of using the money for college is \$90,000, but the value to *C* of using the money to enter a poker competition is \$110,000. From an *ex post* view, a court should terminate the trust because the value to *C* of owning the property outright (\$110,000) exceeds the value to *C* of owning the property in trust (\$90,000), and *D* is dead. However, from an *ex ante* view, a court should effectuate *D*'s intent because *ex ante* analysis incorporates *D*'s utility during life, in addition to *C*'s utility. Here, the value to *D* and *C* of not terminating the trust (\$30,000 + \$90,000 = \$120,000) exceeds the value to *D* and *C* of terminating the trust (\$0 + \$110,000 = \$110,000). As noted above, effectuating a donor's interests is not always equivalent to maximizing social welfare, because an increase in the donee's utility *ex post* might outweigh any decrease in the donor's utility *ex ante* (assuming there are no other *ex ante* consequences). See *supra* note 67.

165. The incentive to accumulate property is related to a donor's satisfaction during life. Hirsch points out that, because "testamentary freedom adds to the utility owners derive from what they acquire," effectuating the wishes of donors "enhances their incentive both to produce and to save wealth." Hirsch, *supra* note 49, at 51.

166. SHAVELL, *supra* note 10, at 65.

167. Hirsch & Wang, *supra* note 28, at 8. The existence and magnitude of this effect on the donor's incentive to accumulate property are empirical questions, although there is little empirical research on such questions except in the context of estate taxation.

property less attractive relative to consuming property, the testator may have an incentive to save less.<sup>168</sup> If so, the testator may have less property in her estate to transfer to donees at death. The idea applies not only to wills but also to trusts: “Individuals who know that their intent cannot be carried out in a trust may behave differently: they may choose to spend money during their lifetime that they might have left for their descendants in a trust.”<sup>169</sup> Thus, restrictions on testamentary freedom may result in excessive consumption relative to savings.

At first glance, this result may seem to benefit the donor—after all, the donor now consumes more during life. But consuming more and giving less actually reduces a donor’s utility. All other things being equal, the donor would prefer giving the property to others rather than consuming it. In the absence of a legal limitation or judicial intervention, the donor would have saved and donated the property, rather than consuming it, consistent with the donor’s preferences. In addition, if a donor consumes more and saves less, this additional consumption is detrimental to donees. Because the donor will save less, the donor will have less property to transmit to donees at the time of the donor’s death. Thus, from a social perspective, the excessive consumption is undesirable because it harms the donor and the donees and reduces the overall savings rate.<sup>170</sup>

One objection is whether individuals will in fact work less or save less if they anticipate being unable to bequeath property.<sup>171</sup> Even assuming restrictions on testamentary freedom have little or no impact on most people’s incentive to work, they may affect certain types of donors. Suppose a donor has enough money to satisfy his own needs, wants, and desires, as well as those of his children, and plans to give future earnings to charity or his grandchildren. This donor might prefer to work as a CEO for several more years, not only because his wisdom and experience are useful to the company but also so that he can support his favorite charities and help provide for his grandchildren’s future. Alternatively, the donor could retire to Arizona or Florida. Assuming he is still a productive executive,

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168. See, e.g., POSNER, *supra* note 19, at 688 (“[H]eavy estate taxation, by raising the price of posthumous consumption relative to present consumption, will reduce the incentive to save and increase the incentive to consume.”); cf. Joshua C. Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 REAL PROP. PROB. & TR. J. 445, 479 (2006) (“[W]hen the law imposes a mandatory rule with respect to trusts, it may have an impact on what potential settlors do with their money.”).

169. Tate, *supra* note 168, at 479. Again, the existence and magnitude of this effect are empirical questions.

170. See Halbach, *supra* note 6, at 6.

171. Does limiting freedom of disposition have any marginal effect on an individual’s decision to work, in terms of the number of years, the number of hours per week, or the types of employment opportunities they pursue? Or will donors work the same regardless of the laws governing succession? Similarly, does limiting freedom of disposition have any effect on an individual’s decision to save rather than consume? For an analysis of wealth transfer taxation that cites to a number of early empirical studies related to this issue, see Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283, 318–21 (1994).

reducing the CEO's incentive to continue working would be socially undesirable.<sup>172</sup>

Another objection is that even if a rule decreases a *donor's* incentive to work (suppose the CEO retires three years early), any loss of productivity may be offset by an increase in the *donees'* incentives to work (the CEO's grandchildren will have to study and work harder). In discussing estate taxation, Judge Richard Posner argues that, for this reason, "aggregate effects of heavy estate taxation on work, saving, and consumption are probably slight."<sup>173</sup> Posner asserts that "the diminished incentive of heavily taxed potential testators to work hard may be offset by the increased incentive of their potential heirs to work hard."<sup>174</sup>

The net effect of restricting testamentary freedom on the donor's and donees' incentive to work is ultimately an empirical question. Andrew Carnegie famously suggested that "the parent who leaves his son enormous wealth generally deadens the talents and energies of the son, and tempts him to lead a less useful and less worthy life than he otherwise would."<sup>175</sup> In an empirical study testing Carnegie's conjecture, Douglas Hotz-Easkin, David Joulfaian, and Harvey Rosen found that sizable inheritances do decrease a person's participation in the labor force.<sup>176</sup> However, there is relatively little evidence comparing the relative magnitude of the effect on donees with the effect on donors.

Posner and Carnegie are correct that, theoretically, a bequest may affect a donee's incentives in socially undesirable ways. On the other hand, there are several reasons why the effect on donor behavior may still be relevant, and why this effect may outweigh any adverse effects on donees. First, the social loss from a decline in the donor's labor may exceed the social loss from any decline in the donees' labor. Second, given the diminishing marginal utility of wealth, the same property may result in more happiness in the hands of the donees than in the hands of the donor, if the donor's wealth exceeds the wealth of individual donees. Third, a gift may have little or no effect on the incentive of donees to work if the donor gives the property to a charity rather than individuals (grandchildren).<sup>177</sup> Fourth, like

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172. If a worker is not a productive member of the labor force, then providing incentives for the worker to retire may increase productivity. See Xavier X. Sala-i-Martin, *A Positive Theory of Social Security*, 1 J. ECON. GROWTH 277, 277 (1996) (suggesting that "pensions are a means to induce retirement—that is, to buy the elderly out of the labor force because aggregate output is higher if the elderly do not work").

173. POSNER, *supra* note 19, at 689.

174. *Id.*

175. Andrew Carnegie, *The Advantages of Poverty*, in THE "GOSPEL OF WEALTH" ESSAYS AND OTHER WRITINGS 31, 38 (David Nasaw ed., Penguin Grp. 2006) (1891).

176. See Douglas Hotz-Easkin, David Joulfaian & Harvey S. Rosen, *The Carnegie Conjecture: Some Empirical Evidence*, 108 Q.J. ECON. 413, 432 (1993) ("[F]amilies with one or two earners who received inheritances above \$150,000 were about three times more likely to reduce their labor force participation to zero than families with inheritances below \$25,000.").

177. The gift may affect the incentives of the charity in other ways, for example, reducing the need for the charity to raise funds. Conversely, if a restriction on testamentary freedom causes the donor to switch from a charitable beneficiary to an individual donee, then the restriction may have negative effects on the incentives of both the donor and donee.

Carnegie, many affluent donors are aware of this problem and take measures, including the use of incentive trusts, to mitigate any adverse effect on donees.<sup>178</sup>

Overall, ignoring the effect of limitations on testamentary freedom on the donor's incentive to save and invest would be similar to ignoring the impact of an estate tax on the incentive to save and consume.<sup>179</sup> To be sure, the magnitude of this effect is difficult to estimate empirically, and the effect may be offset to a certain extent by a greater incentive for future generations to accumulate wealth.<sup>180</sup> However, the effect on the donor's incentive to save and invest should be a relevant consideration.

### 3. Structure and Timing of the Donor's Gifts

In addition to affecting the donor's happiness and incentive to save and invest, the applicable legal rule might alter the donor's ex ante behavior by affecting the structure and timing of gifts. Specifically, the choice of rule may affect the timing of a gift, the identity of donees, and the size of a gift, including whether or not the donor decides to give a gift at all.

First, ex ante analysis recognizes that the law may affect the timing of a gift. A donor may transfer property during life ("inter vivos" gifts), at death ("testamentary" gifts), or even after death (gifts made in trust). Because the "legal policies controlling inheritance can be partially circumvented by increases in inter vivos gifts," individuals may opt to transfer property during life rather than at death.<sup>181</sup> For example, shortly after enacting the estate tax, Congress had to enact a gift tax to prevent donors from circumventing the estate tax by giving away their property during life. As a result, it may be difficult and costly to curtail gratuitous transfers at death.<sup>182</sup> In addition, inter vivos transfers can be socially suboptimal because of what Hendrik Hartog has called the "King Lear" problem—"the problem of not giving up control and power and property *too early*."<sup>183</sup>

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178. See, e.g., Richard I. Kirkland, Jr., *Should You Leave It All to the Children?*, FORTUNE, Sept. 29, 1986, at 18 (interviewing Warren Buffett, who stated that "the perfect amount to leave to children is 'enough money so that they would feel they could do anything, but not so much that they could do nothing'"); see also DUKEMINIER & SITKOFF, *supra* note 90, at 9–10 (pointing out that settlors often rely on "incentive trusts" to ensure a "beneficiary does not adopt a slothful or frivolous lifestyle").

179. See POSNER, *supra* note 19, at 688 ("[H]eavy estate taxation, by raising the price of posthumous consumption relative to present consumption, will reduce the incentive to save and increase the incentive to consume."); see also McCaffery, *supra* note 171, at 318–21.

180. See *supra* notes 174–76 and accompanying text.

181. SHAVELL, *supra* note 10, at 66; see also Hirsch, *supra* note 49, at 51 ("[D]enying freedom of testation in the statute books would not curtail it in action (absent very costly policing), for testators could avail themselves of roundabout, or if need be surreptitious, expedients to reach the same result.")

182. See WILLIAM GODWIN, ENQUIRY CONCERNING POLITICAL JUSTICE 718–19 (Isaac Kramnick ed., Penguin 1985) (1793); Hirsch & Wang, *supra* note 28, at 11.

183. HENDRIK HARTOG, SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE 33 (2012) (emphasis added). Near the beginning of *King Lear*, Lear foolishly disposes of his estate by giving away property to two of his three daughters, even though he is still alive. WILLIAM SHAKESPEARE, KING LEAR act 1, sc. 1.

Second, the *ex ante* perspective recognizes that the law may affect the identity of donees. If a donor believes that a court is unlikely to effectuate gifts to certain donees or certain types of donees,<sup>184</sup> the donor may choose to give her property to others at the outset. Suppose a donor executes a will that contains a conditional bequest to a child and a gift over to a charity. If the donor anticipates a court will not enforce the condition in the bequest, the donor may just provide an outright gift to the charity, eliminating any possibility of the child's satisfying the condition and receiving the bequest.

Likewise, a donor may alter the size of a gift. Suppose a donor wishes to give a charity \$2 million from her estate, but the donor believes a court will allow the charity to allege "changed circumstances" too easily and alter the distributional provisions through *cy pres*. Anticipating this possibility, the donor may give the charity only \$500,000, rather than \$2 million, from her estate. Once again, a donor may alter her behavior or the size of her gifts not only in wills but also in trusts: "Individuals who know that their intent cannot be carried out in a trust may behave differently" because "they may choose to alter the plan of their trust and leave their property to different individuals or entities or to vary the amount left to each beneficiary."<sup>185</sup>

Third, the *ex ante* view recognizes that, in response to a restriction on testamentary freedom, a donor may limit gratuitous transfers at death or forgo such gifts entirely. Posner mentions the possibility that "in the long term, as testators 'wise up' to the courts' policy of refusing to enforce conditions that the judges deem unreasonable, they will curtail bequests."<sup>186</sup> Similarly, Hirsch notes that allowing trustees "to deviate at their discretion from any charitable purpose immediately upon creation of the trust" could "prompt the testator *ex ante* to refrain from making charitable bequests."<sup>187</sup> Thus, if the law disregards donative intent, donors may alter their behavior and choose to curtail bequests or forgo giving altogether.

Historically, in attempting to dismiss this possibility, some jurists have argued that even if courts interfere with the freedom of testation and disregard donative intent, donors will continue to give and will give in the same way. In *The Dead Hand*, Arthur Hobhouse concludes: "Another plea for non-interference is that many people will cease to give if they see the gifts of others freely remodelled."<sup>188</sup> Hobhouse opines: "This plea appears to me to rest on no evidence and no probability, and even if it did, it would not be valid."<sup>189</sup>

As Hobhouse suggests, whether and to what extent intervention through succession law affects the structure and timing of gifts is an empirical question. Currently, except in estate and gift taxation, there is little

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184. See generally Leslie, *supra* note 12, at 236 ("Notwithstanding frequent declarations to the contrary, many courts are as committed to ensuring that testators devise their estates in accordance with prevailing normative views as they are to effectuating testamentary intent.").

185. Tate, *supra* note 168, at 479.

186. POSNER, *supra* note 19, at 700.

187. Hirsch, *supra* note 49, at 89 n.203 (emphasis added).

188. ARTHUR HOBHOUSE, *THE DEAD HAND* 224 (London, Chatto & Windus 1880).

189. *Id.* at 225.

empirical work investigating the effects of legal rules on the timing and structure of gifts.<sup>190</sup> However, for the theoretical reasons noted above, courts and commentators should consider the possibility that the law may have an impact on the donor's incentives.

#### 4. Other Ex Ante Considerations

This section explores several other factors that are often overlooked from an ex post perspective. These factors include both reliance and rent seeking by potential donees; the incentives of fiduciaries, attorneys, and other estate planning professionals; the probability that donees or potential donees may contest a will or trust; and the magnitude of litigation costs if parties change their behavior in response to the legal rule.

First, altering a gratuitous transfer at death may affect other potential donees. A family member who is disinherited or a donee who receives less than what the donee expected may suffer disutility based on the disposition itself. For example, a child who expects to receive a significant bequest from a parent or to receive an equal share of the parent's estate may suffer disappointment if the parent intentionally disinherits the child or provides less than an equal share of the estate.<sup>191</sup> Moreover, a donee (and the donor) may benefit if the donee is able to engage in ex ante reliance on the donor's bequest.<sup>192</sup> Restricting a donor's ability to make a binding promise to the donee may affect the donee's ex ante behavior and reduce social welfare.<sup>193</sup>

Second, donees may engage in rent-seeking behavior.<sup>194</sup> Frequently, potential donees will have a private incentive to take actions to increase their share of the decedent's estate.<sup>195</sup> But many of these actions are socially wasteful.<sup>196</sup> For example, donees may attempt to convince the

190. See, e.g., B. Douglas Bernheim et al., *Do Estate and Gift Taxes Affect the Timing of Private Transfers?*, 88 J. PUB. ECON. 2617, 2617 (2004) (“[H]ouseholds experiencing larger declines in the expected tax disadvantages of bequests reduced inter vivos transfers relative to households experiencing small declines in the tax disadvantages of bequests.”).

191. See Shelly Kreiczler-Levy, *Religiously Inspired Gender-Bias Disinheritance—What's Law Got To Do with It?*, 43 CREIGHTON L. REV. 669, 670 (2010) (“[D]isinheritance can disappoint and anger the child, stimulating feelings of rejection.” (citing B. Douglas Bernheim & Sergei Severinov, *Bequests As Signals: An Explanation for the Equal Division Puzzle*, 111 J. POL. ECON. 733 (2003))).

192. See Shavell, *supra* note 157, at 402 (“Before a donee receives a gift, he may take actions that will increase its value . . . . For example, the nephew may study in preparation for college; this will make a gift of a college education more useful for him.”); see also Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1276–83 (1980) (discussing the donee's reliance interest).

193. See Shavell, *supra* note 157, at 419–20 (offering a formal model of deferred giving and altruism and concluding that “donors should be able to bind themselves to give gifts” because donors may want “to distinguish themselves from masqueraders and thereby to induce donees to rely, enhancing the value of gifts” to both donors and donees).

194. On rent-seeking behavior in the context of succession, see James M. Buchanan, *Rent Seeking, Noncompensated Transfers, and Laws of Succession*, 26 J.L. & ECON. 71 (1983).

195. See *id.* at 74.

196. See *id.* at 74–75; Hirsch & Wang, *supra* note 28, at 10; see also Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 108 (1990) (“When potential donees and legatees compete for the favor of a donor or testator, they engage in activity that creates no new wealth. They expend resources over the allocation of wealth already in existence.”).

donor to increase their allocation of the estate or decrease the shares of others. Some donees also may attempt to persuade a donor to revoke (or not to revoke) an existing will or to execute a new will if doing so will change a disposition in their favor.<sup>197</sup> Donees may lobby the legislature to enact (or not to enact) certain laws that may favor (or disfavor) their interests.<sup>198</sup> They also may file lawsuits challenging the validity of a will or trust or the interpretation of its distributional provisions, in the hope of extracting a settlement from the estate.<sup>199</sup> Such activities are socially wasteful insofar as potential donees would not have undertaken them but for the possibility of increasing their share of the estate.<sup>200</sup>

Third, the law may affect the incentives of fiduciaries (such as executors and trustees), attorneys, and other estate planning professionals. For example, in investing trust assets, trustees had different incentives under the traditional prudent man rule (where courts often exhibited hindsight bias) than under the modern prudent investor rule.<sup>201</sup> Ex ante analysis also considers the incentives of attorneys and estate planning professionals who assist in preparing, drafting, executing, and administering wills and trusts. The level of care these professionals exercise may depend to a certain extent on the applicable legal rule. For example, an attorney that is drafting a will may exercise optimal care if the attorney knows that he or she is responsible, financially as well as professionally, for any mistake.<sup>202</sup> The attorney may exercise less care if the attorney recognizes that liability for malpractice is unlikely and that, even if there is an error, a court is likely to reform the will rather than impose malpractice liability.<sup>203</sup> Of course, attorneys have other motivations, including their professional reputations, that provide incentives for exercising due care as well.<sup>204</sup>

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Pure rent seeking should be distinguished from an exchange in which a person provides care for elderly parents or others in anticipation of a gift from the estate, an exchange that may be welfare enhancing. *See supra* notes 62–64, 155 and accompanying text.

197. It is worth noting that the possibility of rent-seeking behavior is one argument against adopting a system of testamentary freedom in which a donor has considerable discretion in choosing beneficiaries. *See Buchanan, supra* note 194, at 78.

198. *See* ROBERT D. TOLLISON, *THE ECONOMIC ANALYSIS OF RENT SEEKING* (1995); Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 *J. LEGAL STUD.* 101 (1987).

199. *See* John H. Langbein, *Living Probate: The Conservatorship Model*, 77 *MICH. L. REV.* 63, 66 (1978) (stating that most litigation over capacity “is directed towards provoking pretrial settlements” and “the odor of the strike suit hangs heavily over this field”); *see also* Daniel B. Kelly, *Strategic Spillovers*, 111 *COLUM. L. REV.* 1641, 1685–86 & n.200 (2011).

200. *See, e.g., Buchanan, supra* note 194, at 78 (“[I]nvestment in litigation . . . reflects socially wasteful rent seeking, even if it is now directed toward a different object from that which occurs when discretionary power remains with the potential donor of transfers.”).

201. *See supra* Part II.B.

202. *Cf.* Carol M. Rose, *Crystals and Mud in Property Law*, 40 *STAN. L. REV.* 577, 592 (1988) (“Judicial punctiliousness about establishing and following clear rules, one would suppose, can influence behavior in the direction of greater productivity or carefulness.”).

203. *See* Champine, *supra* note 48, at 439–40.

204. *See* Leandra Lederman & Warren B. Hsung, *Do Attorneys Do Their Clients Justice? An Empirical Study of Lawyers’ Effects on Tax Court Litigation Outcomes*, 41 *WAKE FOREST L. REV.* 1235, 1241–42 (2006); *cf.* A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 *HARV. L. REV.* 1437, 1440 (2010) (arguing that firms



Fourth, the *ex ante* view recognizes that the probability of litigation and magnitude of litigation costs are likely to vary depending on the legal rule. The likelihood of litigation may depend on how a legal rule affects the donor's incentives to structure a gift and the donees' incentives to contest a will or trust. It also may depend on how much uncertainty or unpredictability a rule creates. Likewise, the magnitude of litigation costs depends on several factors, including the extent to which the donor or donor's estate can anticipate and avoid litigation, donees may use litigation (or its threat) to advance their interests, and courts may invest time and effort in correcting errors. Litigation costs also depend on the clarity of will and trust provisions, which themselves may depend on the probability of legal intervention and the size of an estate. Thus, different legal rules will create different incentives to litigate and various levels of litigation costs.

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Overall, the *ex ante* perspective is superior to the *ex post* perspective because it incorporates the effects of legal rules on incentives and avoids the trap of hindsight bias. In succession law, there are a number of *ex ante* considerations that courts and commentators often overlook, including a donor's happiness, a donor's incentive to accumulate property, and the structure and timing of gifts. If donors believe that courts may not facilitate their intent, donors may not only be less happy and consume more during life, but also may alter, restrict, or forgo their gifts at death. Adopting an *ex ante* perspective does not provide a definitive answer about whether a legal rule or policy that restricts testamentary freedom is socially desirable or socially undesirable.<sup>205</sup> But evaluating a legal rule or policy from an *ex post* perspective is incomplete and potentially misleading. Given the

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may have an "incentive to make safe products even in the absence of product liability" because of market forces such as reputation).

205. While pointing out the importance of incorporating *ex ante* analysis in evaluating restrictions on testamentary freedom, this Article has not discussed the social desirability of such restrictions. For example, in response to a rule prohibiting a certain type of conditional bequest, a donor may decide to forego the donative transfer. But whether or not this change in the donor's actions is socially desirable depends on the condition itself and the policy reason underlying its prohibition. For example, a trust delaying postponement of a gift until the beneficiary turns twenty-one (which most courts would uphold) is different from a conditional bequest that contains a restriction on marriage (which depends on the court and the circumstances), which differs from a racially discriminatory provision in a will or trust (if the discrimination is invidious, courts will invalidate the discriminatory provision, terminate the trust, or apply *cy pres* to reform a charitable trust). In each case, effectuating or not effectuating the condition may affect the donor's *ex ante* actions, but the question of whether intervention is socially desirable is a distinct, albeit related, issue.

In addition, it is worth noting that the *ex ante* approach is not coextensive with the donor's *ex ante* interests. As noted above, in some instances, effectuating a donor's interests may conflict with maximizing social welfare, i.e., restricting testamentary freedom may decrease the donor's utility, but the decrease might be outweighed by an increase in the donee's utility. *See supra* note 67 and accompanying text. Typically, however, the legal system does not have enough information to second guess the donor's disposition and raise social welfare. Moreover, even when society believes that it can make such a judgment *ex post*, the *ex ante* consequences (e.g., on the donor's incentive to accumulate property or the structure and timing of the donor's gift) may militate in favor of effectuating donative intent.

importance of *ex ante* considerations, the next section investigates the social desirability of various justifications for restricting testamentary freedom.

### III. JUSTIFICATIONS FOR RESTRICTING TESTAMENTARY FREEDOM

While effectuating donative intent is typically consistent with maximizing social welfare, there are several reasons why a donor's express wishes may diverge from what is socially desirable: imperfect information, negative externalities, and intergenerational equity. This Article contends that, at least theoretically, each of these reasons may provide a justification for restricting testamentary freedom. This Article then examines two other reasons why courts may disregard a donor's intent: maximizing the donees' *ex post* interests and discounting the donor's preferences. It contends that, from an *ex ante* perspective, these justifications are problematic.

#### A. *Legitimate Justifications (in Theory)*

From an economic perspective, there are several theoretical reasons why effectuating the donor's express wishes may diverge from what is socially optimal, including (1) imperfect information, (2) negative externalities, and (3) intergenerational equity.<sup>206</sup>

##### 1. Imperfect Information

One reason why effectuating donative intent is not necessarily consistent with maximizing social welfare is imperfect information. Future events are difficult to foresee and unanticipated contingencies may arise. As a result, a donor may dispose of property in a way that contradicts what the donor would have wanted with complete information. Moreover, even if foreseeable, each contingency is costly to specify. Consequently, a donor may not explicitly provide for the disposition of property under all possible circumstances. In either case, an unforeseen or unprovided-for contingency, judicial intervention may be necessary to carry out the donor's probable intent, *i.e.*, the donor's true plans under perfect information.<sup>207</sup>

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206. In surveying "[v]alid arguments against dead hand control of property," Shavell mentions "the cost and impracticality of making highly refined arrangements for dead hand control," "harmful external effects," and "inherent inequality in the wealth of the present generation versus that of future generations." SHAVELL, *supra* note 10, at 70–71. I examine each of these justifications in greater detail. Analyzing the legitimate, as well as illegitimate, justifications for restricting testamentary freedom is important not only for analytical clarity but also because many members of the public are unable to articulate why the law should restrict, or not restrict, a person's distribution of property at death. See Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 336 ("When respondents were asked the general question concerning freedom of testamentary disposition, 89 percent thought there should be no restrictions. When asked to explain, the respondents merely repeated their beliefs that a person should not be restricted in choosing a distributive plan.").

207. See SHAVELL, *supra* note 10, at 70 ("If . . . the plans that are made for the control of property after death are not reflective of the true detailed plans that would have been made if the individuals had the time and ability to consider all possibilities, the state's modification of their plans may sometimes be justified as an attempt to carry out their true plans."); *cf.*

To amplify, because future events are difficult to predict, “many kinds of future outcomes would not even be contemplated by a person when making provisions for the control of property.”<sup>208</sup> While a person is alive, one “reason why a person may modify a will is simply that the writer did not include a contingency in the will because, at the time the will was written, the contingency was unlikely or not even contemplated.”<sup>209</sup> However, after death, it is impossible for the donor to modify a disposition on account of an unforeseen event or unanticipated contingency.<sup>210</sup>

Given that such “recontracting” is infeasible,<sup>211</sup> judicial intervention may enhance social welfare if a court modifies or interprets a will or trust consistent with the donor’s probable intent.<sup>212</sup> If interpretation or modification of the donative document were not permitted, then a transfer pursuant to the donor’s express wishes might be socially undesirable.<sup>213</sup> The court’s objective should be to determine the donor’s probable intent, assuming the donor had foreseen all relevant circumstances and events.<sup>214</sup> As a result, intervening to maximize social welfare is not inconsistent with the donor’s true intent.

Second, even if a donor is able to foresee future contingencies, it may not be rational for the donor to provide for each particular contingency in the will or trust. In contract law, Oliver Hart, Oliver Williamson, and others have pointed out that parties may omit terms to save time, money, and effort because “many eventualities are hard to anticipate or describe in advance” and “writing contracts involves costs that rise with the number of contractual terms.”<sup>215</sup> In highlighting a similar phenomenon in the context of gifts at death, Shavell points out that it would often be irrational for individuals to “make highly detailed plans for the control of property after

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RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.2 cmt. b (2003) (“The rationale for modifying a donative document is that the donor would have desired the modification to be made if he or she had realized that the desired tax objectives would not be achieved.”). One type of unforeseen or unprovided-for contingency that might alter the donor’s disposition is a change in the applicable law (including, perhaps, a change in a legal rule favoring the ex post perspective).

208. SHAVELL, *supra* note 10, at 70.

209. *Id.* at 64.

210. POSNER, *supra* note 19, at 699 (suggesting courts should have the ability to modify testamentary gifts because there is no possibility of “recontracting” once the donor is dead and arguing for a “cy pres approach in private as well as charitable trust cases”).

211. *Id.*

212. *See* UNIF. TRUST CODE § 412, 7C U.L.A. 507 (2010); RESTATEMENT (THIRD) OF TRUSTS § 66(1) (2003).

213. *See* POSNER, *supra* note 19, at 695.

214. *Cf. id.* at 696 (“[T]he dilemma of whether to enforce the testator’s intent or to modify the terms of the will in accordance with changed conditions since his death is often a false one. A policy of rigid adherence to the letter of the donative instrument is likely to frustrate both the donor’s purposes and the efficient use of resources.”).

215. Shavell, *supra* note 16, at 289–90; *see also* OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* (1985); Oliver Hart & John Moore, *Foundations of Incomplete Contracts*, 66 *REV. ECON. STUD.* 115 (1999); Oliver Hart & Bengt Holmström, *The Theory of Contracts*, in *ADVANCES IN ECONOMIC THEORY* 71 (1987); Jean Tirole, *Incomplete Contracts: Where Do We Stand?*, 67 *ECONOMETRICA* 741 (1999).

death.”<sup>216</sup> The reason is that “the cost of making a detailed provision is borne with certainty, whereas the benefit is discounted by the often extremely small likelihood of the occurrence of a contingency and perhaps by its remoteness in time.”<sup>217</sup> Once again, a court’s intervening to address a circumstance that a donor did not address explicitly may be consistent with the donor’s probable intent and enhance social welfare.<sup>218</sup>

Thus, like contracts, gratuitous transfers at death entail the problem of imperfect information. Donors are incapable of anticipating all future contingencies and, even if they could, it would not be cost-effective to specify each contingency in a will or trust. Unlike contracts, the devisees of a will or the beneficiaries of a trust can no longer negotiate with the testator or settlor once he or she is dead if circumstances change or new information emerges.<sup>219</sup> Hence, judicial intervention to modify or interpret the terms of a gift may be desirable in certain situations, and such intervention may be consistent with the donor’s probable intent.<sup>220</sup> Of course, because courts also lack perfect information, judicial intervention to modify or interpret the

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216. SHAVELL, *supra* note 10, at 70.

217. *Id.*

218. In addition, several cognitive limitations, tangentially related to imperfect information, may justify restrictions on testamentary freedom. The UPC requires a testator to be “18 or more years of age.” UNIF. PROBATE CODE § 2-501, 8 U.L.A. pt. I, at 144 (2010). Conversely, a court sometimes employs a more searching inquiry if a testator is elderly or exhibits signs of senility. *Cf.* SHAVELL, *supra* note 10, at 66 (“The donor’s inability to make a sound decision might also be suggested as a rationale for state control of bequests; in the late stages of life, an individual’s judgment is often impaired.”). If a person is insane, a court will not probate the person’s will because a testator must be of “sound mind.” UNIF. PROBATE CODE § 2-501, 8 U.L.A. pt. I, at 144; *see also* DUKEMINIER & SITKOFF, *supra* note 90, at 266 (discussing reasons for the requirement of mental capacity). A court also may not effectuate a donor’s wishes if the donor was under the influence of alcohol or drugs at the time of executing a will, though evidence of addiction does not negate testamentary capacity. *See* Pamela Champine, *Expertise and Instinct in the Assessment of Testamentary Capacity*, 51 VILL. L. REV. 25, 36 (2006) (noting that the “standard doctrine” is that addiction “does not preclude the existence of testamentary capacity” (citing *In re Herman*, 734 N.Y.S.2d 194 (App. Div. 2001); *In re Sechrest*, 537 S.E.2d 511 (N.C. Ct. App. 2000))). Likewise, situations involving defects in testamentary capacity due to undue influence or coercion are cases in which not effectuating wills or trusts as written is clearly beneficial. In each situation—minority, senility, insanity, intoxication, and undue influence or coercion—the objective of intervening is not to effectuate the donor’s express wishes. Rather, the aim is to provide a disposition that most closely approximates the donor’s probable intent.

219. *See* RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. i (2003) (noting that “the ‘rigor mortis’ of deadhand control is not present while a property owner is able to respond to persuasion and evolving circumstances”); *see also* POSNER, *supra* note 19, at 696 (“[T]here is a stronger case for paternalism in the case of wills than in the case of contracts. Contracts can be modified, but a person cannot modify the terms of his will after he’s dead.”).

220. The objective would be to determine a donor’s probable intent, i.e., the donor’s true intent with perfect information. Thus, legal intervention because of imperfect information, including but not limited to changed circumstances, is not restricting testamentary freedom, but facilitating it. *Cf.* POSNER, *supra* note 19, at 696 (“[A] rational donor knows that his intentions might eventually be thwarted by unpredictable circumstances and may therefore be presumed to accept implicitly a rule permitting modification of the terms of the bequest in the event that an unforeseen change frustrates his original intention.”).

terms of a will or trust has significant costs as well, including error costs and decision costs.<sup>221</sup>

## 2. Negative Externalities

Even if a donor had perfect information, there might still be a legitimate justification for legal intervention. Specifically, if the donor's disposition entails external costs or "externalities," then effectuating donative intent might be inconsistent with maximizing social welfare.<sup>222</sup> Owners often impose harm on others by using their property (e.g., pollution from a factory). Externalities also may arise because of a disposition of property at death.<sup>223</sup> The problem is that an owner (here, the donor) may have an incentive to undertake an activity (in this case, a gift at death) if the "activity's private benefits exceed its private costs even though, as a result of the externality, the activity is undesirable as its social costs exceed its social benefits."<sup>224</sup>

Consider the disinheritance of minor children.<sup>225</sup> Hirsch notes that "one potential justification for compulsory bequests to children is spillover costs, which could arise with regard to minor or disabled children who are unable to fend for themselves."<sup>226</sup> Likewise, Shavell explains that a "dependent child who does not inherit wealth may receive public support," and that, as a result, a "person might reduce or exclude his or her allocation to . . . children, depending on public support to take up the slack."<sup>227</sup> However,

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221. For this reason, whether a court should intervene depends not only on the donor's information but also the court's information, as well as the administrative and litigation costs of attempting to discern the donor's probable intent. In theory, if a donor is skeptical about the possibility of judicial intervention, the donor might insert a "no modification clause" or another provision specifying either the circumstances in which the court can intervene or the method of interpretation. That is, some donors may affirmatively choose not to have the court update their donative documents or not to investigate their probable intent, even in cases involving imperfect information. *Cf. id.* ("Some rational donors, mistrustful of judges' ability to alter the terms of a bequest intelligently in light of changed conditions, might prefer to assume the risks involved in rigid adherence to the original terms.").

222. For an overview of the externalities problem, see SHAVELL, *supra* note 10, at 77–109.

223. *See id.* at 65, 71.

224. Kelly, *supra* note 199, at 1644, 1649–51 (summarizing the problem with negative externalities).

225. Suppose Joe has two minor children and assets valued at \$4 million. Instead of devising \$4 million in equal shares to his children or providing \$2 million to each child in trust, Joe decides to give all of his property to a favorite charity, thus disinheriting his children. Joe dies, the executor of Joe's estate distributes his assets according to Joe's wishes, and Joe's children, both of whom are minors, are left penniless. Joe's children will continue to need financial support for food, shelter, education, and health care. The government, a religious or charitable organization, or a family member must now step in to provide this support. As a result, Joe's decision to disinherit his children has external effects on others who must pay for their care.

226. Hirsch, *supra* note 29, at 2236; *see also* Brashier, *supra* note 9, at 3 ("When the disinherited child is a minor, unable to provide for himself, society often must bear the cost of the parent's disinheriting act.").

227. SHAVELL, *supra* note 10, at 65; *cf.* Horton, *supra* note 143, at 1703 (noting that "trusts can create externalities by excluding certain individuals," including dependents).

despite this potential externality, the UPC and almost every state (except Louisiana) permit parents to disinherit their minor children.<sup>228</sup>

While generally permitting the intentional disinheritance of children, American succession law does restrict the freedom of testation in other situations involving externalities. For example, a court will not enforce a devise encouraging an illegal activity that is socially undesirable. If a donor attempts to devise \$1 million to a person in a murder-for-hire scheme, effectuating the donor's intent would be socially undesirable.<sup>229</sup> Similarly, in addition to being illegal under the Equal Protection Clause and federal and state antidiscrimination laws,<sup>230</sup> a racial restriction in a will is contrary to public policy because such a restriction imposes harm on others, including the victims of discrimination, other individuals within the targeted group, and society in general.<sup>231</sup> In addition, even if an activity is legal, a court may refrain from enforcing a devise on the basis of public policy if the devise entails a significant externality. For example, although disrupting family relationships is often legal, a will provision that attempts to encourage divorce or separation is unenforceable.<sup>232</sup>

Moreover, one major justification for spousal rights, such as the UPC's elective share,<sup>233</sup> is a concern that disinheritance may impose harm on others. In addition to the harm on the surviving spouse, a concern is that the donor, knowing "a spouse . . . who does not inherit wealth may receive public support," may decide to "reduce or exclude his or her allocation to a spouse" and that, consequently, "[t]his externality might justify a stipulation that some minimum fraction of property be given to spouses."<sup>234</sup>

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228. See Brashier, *supra* note 9; see also Vincent Rougeau, *No Bonds but Those Freely Chosen: An Obituary for the Principle of Forced Heirship in American Law*, 1 CIV. L. COMMENT. 3 (2008) (exploring the history of forced heirship in Louisiana). The existence or magnitude of an externality may depend to a certain extent on the sensibilities of individuals within a particular culture. For example, in some countries, property is viewed more in terms of families than individuals; filial piety plays a central role; and filial disinheritance is extremely uncommon. See, e.g., Ya-Hui Hsu, *Should China Adopt Taiwan's Mandatory Share Doctrine?*, 29 PENN ST. INT'L L. REV. 289, 325–30 (2010) ("Taiwan's mandatory share doctrine is a product of the Chinese culture and tradition.").

229. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (2003) ("Among the rules of law that prohibit or restrict freedom of disposition in certain instances are . . . provisions encouraging illegal activity . . .").

230. See DUKEMINIER & SITKOFF, *supra* note 90, at 766–68.

231. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c; see also SHAVELL, *supra* note 10, at 71 (noting that restrictions on the use of property based on race or religion involve harmful external effects because they may "increase feelings of separateness in the population at large and generally contribute to social friction").

232. See, e.g., *In re Estate of Owen*, 855 N.E.2d 603, 611 (Ind. App. 2006) ("[A] condition to devise by will, the tendency of which is to encourage divorce or bring about a separation of husband and wife, is against public policy and void.").

233. See UNIF. PROBATE CODE art. II, pt. 2, 8 U.L.A. pt. I, at 93–268 (2010).

234. SHAVELL, *supra* note 10, at 65. Posner posits a transaction costs justification for the elective share. See POSNER, *supra* note 19, at 701. On the role of transaction costs in succession, see Kelly *supra* note 29, at 864–67.

Likewise, the UPC protects the rights of the decedent's creditors.<sup>235</sup> The nonpayment of a decedent's debts, including the ability to circumvent creditors at death, would impose harm on others and increase the costs of financing during life.<sup>236</sup> Finally, the law restricts testamentary freedom in several situations involving externalities that are relatively diffuse. These restrictions include the rule against perpetuities,<sup>237</sup> the rule against accumulations of income,<sup>238</sup> and the estate tax.<sup>239</sup>

### 3. Intergenerational Equity

A third theoretical justification for restricting testamentary freedom is intergenerational equity between the interests of the present generation and future generations. Those who are now living may have incentives to use and dispose of property in ways that benefit their own interests. However, the living may not have an incentive to incorporate fully the interests of future generations. Thus, their incentive to use and transfer property may diverge from what is socially optimal.<sup>240</sup>

Kaplow and Shavell have each put forward a version of this argument in two separate contexts. In discussing a rationale for subsidizing gifts, Kaplow argues that there may be too little giving because donors do not have an incentive to incorporate the full value of their gifts to their donees. The level of gift giving may be suboptimal because, although donors may obtain an altruistic benefit from the effect of their gifts on the utility of their donees, they do not take into account that the benefit to the donees is itself

235. See UNIF. PROBATE CODE §§ 3-801 to -816, 8 U.L.A. pt. II, at 208–66.

236. See DUKEMINIER & SITKOFF, *supra* note 90, at 44 (describing one of probate's "core functions" as "protect[ing] creditors by providing a procedure for payment of the decedent's debts" (emphasis omitted)); John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1120–25 (1984) (discussing creditor protection under probate and nonprobate transfers); see also UNIF. PROBATE CODE art. III, pt. 8 general comment, 8 U.L.A. pt. II, at 208 ("Commercial and consumer credit depends upon efficient collection procedures.").

237. See Stewart E. Sterk, *Jurisdictional Competition To Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2117 (2003) ("Without the Rule, or some substitute, settlors are likely to create trusts that generate agency costs and externalities without generating commensurate benefits."). *But cf.* Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 705 (1986) ("The rule against perpetuities and its kindred rules are not directed toward any kind of externality.").

238. *Cf.* Robert H. Sitkoff, *The Lurking Rule Against Accumulations of Income*, 100 NW. U. L. REV. 501, 513–16 (2008) (discussing justifications for rule against accumulations in income and concluding that the "shift in the nature of wealth from land to financial assets and the revolution in trust investment law, taken together, render obsolete the concern over economic distortions stemming from accumulations in trust").

239. See POSNER, *supra* note 19, at 570 ("Estate taxation might . . . seem necessary to prevent the creation over time of huge fortunes that might stimulate political unrest."); SHAVELL, *supra* note 10, at 65 ("One might say that allowing families to retain large amounts of wealth detracts from social cohesion because it allows elites to sustain themselves.").

240. Given that the present generation may not have a private incentive to incorporate fully the social costs (or benefits) of their actions on future generations, the argument based on intergenerational equity is a variation of the argument based on negative (or positive) externalities.

relevant to social welfare.<sup>241</sup> For example, suppose an altruistic person is deciding whether to consume her property or give it away. Consuming the property increases the person's utility by \$75. Giving the property away increases her utility by \$1 for every \$1 increase in the donee's utility. If the donee values the gift at \$50, the donor will have a private incentive to consume the property ( $\$75 > \$50$ ), even though a gift is socially desirable ( $\$75 < \$100$ ). Thus, due to this positive externality, donative transfers, including gifts at death, may diverge from what is socially desirable.

Shavell makes an argument with similar economic logic but applies it explicitly in the context of tradeoffs between the present generation and future generations. He argues, "By virtue of its priority in time, the present generation owns the whole of the earth and all the things on it."<sup>242</sup> As a result, "the present generation has a greater ability to control property than is socially desirable, presuming that the measure of social welfare accords substantial weight to future generations."<sup>243</sup> For example, suppose the world consists of two generations, and the utility of individuals in each generation depends on their consumption of an exhaustible resource, oil. Each member of the present generation, Generation 1, consumes 900 units of oil. Each member of the future generation, Generation 2, then consumes what is left, 100 units of oil. Assuming a diminishing marginal utility of oil (and ignoring the issue of intertemporal discounting), shifting oil from Generation 1 to Generation 2 would raise total utility. Of course, given its priority in time, Generation 1 can exercise control over property, not only by consuming it during life, but also by controlling it after death. Therefore, Shavell suggests that "in order preserve intergenerational equity, limiting the ability of the present generation to control property after their death may be socially warranted."<sup>244</sup>

Although the present generation may have an incentive to give too little or consume too much, the inquiry is complicated by several factors. The idea of intergenerational equity is based on the premise of treating the present generation and future generations equally from the perspective of social utility. However, future generations may benefit from advances in technology and investments in infrastructure made by the present generation.<sup>245</sup> For example, as a result of scientific and technological innovation, future generations may experience fewer diseases, less hunger, and less misery. If so, future generations might be better off than the present one, meaning there would be less of a need for the law to restrict

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241. Kaplow, *A Note on Subsidizing Gifts*, *supra* note 5, at 469–77.

242. SHAVELL, *supra* note 10, at 71.

243. *Id.* Shavell notes that "those alive today might care very little about the well-being of individuals ten generations in the future, but a social welfare measure might accord similar weight to the well-being of individuals ten generations in the future as it does to the well-being of the present generation." *Id.* at 71 n.74.

244. *Id.* at 71.

245. Moreover, depending on the applicable discount rate, investing now in research and technology may bestow greater benefits on future generations than directly transferring property across generations.



testamentary freedom to preserve assets for the future.<sup>246</sup> Therefore, it is unclear whether such intervention is theoretically necessary or desirable (even assuming it would be practical). In any event, it does not appear that the legal system usually relies on this justification, except in certain limited contexts in environmental law, such as protecting endangered species,<sup>247</sup> and intellectual property, such as preserving the public domain.<sup>248</sup>

### B. Illegitimate Justifications

In addition to imperfect information, negative externalities, and intergenerational equity, are there other justifications for limiting a donor's freedom of testation? This section explores two additional justifications for legal intervention: (1) maximizing the ex post interests of donees, which is increasingly common; and (2) discounting the idiosyncratic preferences of donors, which is interesting but relatively rare. From an economic view, both of these justifications are illegitimate.

#### 1. Ex Post Interests of Donees

An increasingly common justification for restricting testamentary freedom is that doing so is necessary to promote the interests of the donees. In certain ways, including the creation of perpetual trusts, donors have attempted to extend the dead hand further than ever before. Yet, on numerous issues, from conditional bequests to modification of trusts, law reformers and courts are increasingly privileging the interests of the donees, even if doing so is inconsistent with the intent of the donor.

Several other commentators have noted this development. For example, in *The New Direction of American Trust Law*, Thomas Gallanis argues that "American trust law, after decades of favoring the settlor, is moving in a new direction, with a reassertion of the interests and rights of the beneficiaries."<sup>249</sup> Gallanis contends the "modern approach" to doctrines like spendthrift protection, administrative deviation, and trust modification illustrates that the pendulum is swinging from a "pro-settlor direction" toward the beneficiaries as "trust law balances the desires of the settlor with the property rights of the trust's beneficiaries."<sup>250</sup> Similarly, in discussing "the larger context of legal reform affecting the scope of dead hand

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246. See POSNER, *supra* note 19, at 689 ("In general, every generation is wealthier than the one before, and this appears to be due far more to increases in knowledge than to deferral of consumption by the previous generation."). On the other hand, there is also the possibility that future people will be worse off, suffering from more war, disease, or natural disasters. If so, intervention may theoretically be needed to prevent the present generation from giving too little to future generations.

247. See, e.g., Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2006); see also Cass R. Sunstein & Arden Rowell, *On Discounting Regulatory Benefits: Risk, Money, and Intergenerational Equity*, 74 U. CHI. L. REV. 171, 188–207 (2007) (discussing the problem of intergenerational equity).

248. See generally Symposium, *Intergenerational Equity and Intellectual Property*, 2011 WIS. L. REV. 103.

249. Gallanis, *supra* note 12, at 216.

250. *Id.* at 237.

control,” Reid Weisbord observes “a retreat away from dead hand control in the broader law of trusts . . . [ , which] has undergone reforms that provide greater protection for beneficiaries.”<sup>251</sup> Weisbord argues that this “modern trend in trust law embodies features that tend to weaken the settlor’s ability to exercise perpetual control over property held in trust.”<sup>252</sup>

To be sure, there is a long tradition within Anglo-American jurisprudence and political philosophy that suggests that the wishes of the dead should not trump the interests of the living. In the late eighteenth century, Thomas Jefferson thought it “self-evident” that “the *earth belongs in usufruct to the living*; that the dead have neither powers nor rights over it.”<sup>253</sup> Likewise, William Godwin asserted that it would be “the most extravagant fiction, which would enlarge the empire of the proprietor beyond his natural existence, and enable him to dispose of events, when he is himself no longer in the world.”<sup>254</sup> Almost a century later, Hobhouse declared:

What I consider to be not conjectural, but proved by experience in all human affairs, is, that people are the best judges of their own concerns; or if they are not, that it is better for them, on moral grounds, that they should manage their own concerns for themselves, and that it cannot be wrong continually to claim this liberty for every Generation of mortal men.<sup>255</sup>

The U.S. Supreme Court, noting that the legislature could “abolish the power of testamentary disposition over property,” has emphasized that “the dead hand rules succession only by sufferance.”<sup>256</sup> Thus, in addition to recent developments in law reform, there is a long tradition that suggests that the wishes of the dead should not control if doing so would be contrary to the interests of the living.

In contrast, a number of legal scholars and political philosophers have argued that courts should defer to the wishes of the donor even after the donor is dead.<sup>257</sup> Moreover, notwithstanding the Supreme Court’s

251. Reid Kress Weisbord, *Trust Term Extension 5* (Oct. 28, 2013) (unpublished manuscript), available at [http://ssrn.com/sol3/papers/cfm?abstract\\_id=2346522](http://ssrn.com/sol3/papers/cfm?abstract_id=2346522).

252. *Id.* at 33. Weisbord points out that this modern trend in trust law favoring beneficiaries is “particularly true of reforms envisioned by national law reform organizations such as the ALI and the National Conference of Commissioners on Uniform State Laws, responsible for publishing the Restatement (Third) of Trusts and the Uniform Trust Code, respectively.” *Id.* In addition, Jeffrey Cooper observes that, over time, there has been a “subtle shift” in trust and fiduciary law: “While the case law repeatedly reaffirms the traditional primacy of a settlor’s intent, the literature increasingly emphasizes the needs of trust beneficiaries and the dictates of modern investment theory.” Cooper, *supra* note 46, at 1172 (footnotes omitted). He concludes that “whereas the settlor’s word was once the sole source of authority, increasingly now [t]here are three voices to which the fiduciary must listen,” namely, the settlor, the beneficiaries, and the market. *Id.* (alteration in original) (quoting *In re Will of Dumont*, No. 1956TT443, 2004 WL 1468746, at \*5 (N.Y. Sur. Ct. June 25, 2004)).

253. Letter from Thomas Jefferson to James Madison, *supra* note 20, at 103.

254. GODWIN, *supra* note 182, at 718.

255. HOBHOUSE, *supra* note 188, at 184–85.

256. *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942).

257. See, e.g., Jeremy Bentham, *Utilitarian Basis of Succession*, in *THE RATIONAL BASIS OF LEGAL INSTITUTIONS* 413, 420–21 (John H. Wigmore & Albert Kocourek eds., 1923);

pronouncement that the dead hand rules succession only by sufferance (as well as recent law reforms in favor of donees), most state and probate courts have continued to defer to a donor's intent in determining the meaning of wills and trusts.<sup>258</sup> Yet, one of the chief concerns in this perennial debate is that, irrespective of the desirability of allowing dead hand control, the state is likely to intervene in gratuitous transfers at death: "The generation that is alive always enjoys the power to use property that the dead would have wanted to control and certainly has an interest in doing so."<sup>259</sup>

The difficulty, of course, is not that the law recognizes the interests of the donees. After all, most gifts are given for the benefit of their donees. Rather, the difficulty is if courts and commentators fail to distinguish the interests of the donees from an ex post perspective versus the interests of the donees from an ex ante perspective. That is, intervening to maximize the donees' ex post interests, as distinct from the donees' ex ante interests, is not a legitimate justification for restricting testamentary freedom.

From an ex post perspective, restricting testamentary freedom in order to maximize the donees' interests would be socially desirable. However, as discussed, the ex post perspective does not incorporate the donor's ex ante interests, including the donor's happiness.<sup>260</sup> Furthermore, the ex post perspective does not recognize that allowing the donees' ex post interests to trump the donor's ex ante wishes may be detrimental to the donees themselves because doing so can be inconsistent with the donees' ex ante interests as a class.

Disregarding donative intent may harm the donees as a class for a simple reason. In response to a legal rule or judicial intervention, a donor can "wise up" and alter her behavior. If the donor believes that the courts will not facilitate her intent, the donor may have an incentive to work less or consume more during life.<sup>261</sup> Consequently, the donor may end up owning less property at death, meaning the donees will have less property to inherit from the donor.

Moreover, even if the law does not alter the donor's incentive to work, save, or invest, the donor may alter a gift. As discussed above, the donor may change the timing of a gift, choose different donees, or forgo the gift altogether.<sup>262</sup> As a result, donees as a class may be worse off if courts intervene on their behalf, even if it may be rational for individual donees to

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Epstein, *supra* note 237; *see also* Gallanis, *supra* note 12, at 237 ("In the late nineteenth century and for much of the twentieth century, American trust law moved in a contractarian, pro-settlor direction."). For an analysis of the arguments favoring or disfavoring dead hand control, *see* SHAVELL, *supra* note 10, at 67–71.

258. *See supra* note 45 and accompanying text; *see also* Weisbord, *supra* note 251, at 34 ("With regard to the new direction of trust law, state legislatures have been slow to embrace the most aggressive reform efforts to contain dead hand control and recent case law reflects continued judicial fidelity to settlor intent when beneficiaries seek to upset the donor's reasons for creating the trust.").

259. SHAVELL, *supra* note 10, at 72.

260. *See supra* Part II.C.1.

261. *See supra* Part II.C.2.

262. *See supra* Part II.C.3.

attempt to modify a donor's wishes. If courts adopt an ex post perspective in determining whether to alter or modify a gratuitous transfer at death, they may end up favoring a legal rule in which everyone, including the donees, is worse off ex ante.

Thus, while an economic analysis of succession law suggests that there are several theoretical justifications for restricting testamentary freedom—imperfect information, negative externalities, and intergenerational equity—disregarding donative intent to maximize the ex post interests of donees is problematic. Consequently, legislators and courts, as well as legal scholars and law reformers, should carefully analyze whether the legal limitations on testamentary freedom are socially desirable from an ex ante perspective.

## 2. Idiosyncratic Preferences of Donors

Most donors transfer their property at death to family members, friends, and charitable organizations. However, occasionally, a donor may have highly idiosyncratic preferences. Suppose a donor creates a multibillion-dollar trust for the care of stray dogs.<sup>263</sup> For example, Leona Helmsley left between \$4 and \$8 billion to a charitable trust for (1) the care of dogs; and (2) medical and health care services for indigent people, especially children. Subsequently, Helmsley deleted the provision benefitting indigent children.<sup>264</sup> Should the law intervene to prevent Helmsley from using all her money for the care of dogs? What if there are other, arguably more urgent, needs such as providing children with food, shelter, and clothing?

As noted above, American succession law usually does not evaluate the dispositive provisions of a donative transfer for their “wisdom, fairness, or reasonableness.”<sup>265</sup> However, courts may refrain from enforcing a will or trust that entails a gift that is clearly for a “capricious” purpose.<sup>266</sup> Thus, while the law typically focuses on facilitating the donor's intent, in certain extreme cases in which a donor's preferences are highly idiosyncratic, such as giving billions of dollars for the care of dogs, a court may not enforce the gift or may reduce the amount of the gift.<sup>267</sup>

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263. See DUKEMINIER & SITKOFF, *supra* note 90, at 425 (“Almost every state has enacted legislation that permits a trust for a pet animal for the life of the animal and often other non-charitable purposes such as perpetual maintenance of a grave.”).

264. See Jeffrey Toobin, *Rich Bitch: The Legal Battle over Trust Funds for Pets*, NEW YORKER, Sept. 29, 2008, at 38.

265. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (2003).

266. See Tamara York, *Protecting Minor Children from Parental Disinheritance: A Proposal for Awarding a Compulsory Share of the Parental Estate*, 1997 MICH. ST. L. REV. 861, 878–79 (“Where the testator's provision is merely capricious and the performance of the provision will benefit no one, the courts will not compel its execution, despite the wishes of the testator.”).

267. Cf. UNIF. TRUST CODE §§ 408–409, 7C U.L.A. 490–95 (2010); UNIF. PROBATE CODE § 2-907(b) (amended 1993), 8 U.L.A. pt. I, at 239–40 (2010). For example, in the Helmsley case, the court ultimately reduced the award to Helmsley's dog, Trouble, from \$12 million to \$2 million. See DUKEMINIER & SITKOFF, *supra* note 90, at 426. At Trouble's death in 2010, the funds remaining in the dog's trust were added to Helmsley's charitable trust, which was

From an economic perspective, restricting testamentary freedom because a donor's preferences are idiosyncratic, even highly idiosyncratic, is not warranted.<sup>268</sup> On the economic view, all preferences are subjective, and all preferences count in the social welfare function.<sup>269</sup> Consequently, there is no objective standard to say that the utility that Ms. Helmsley derives from taking care of these dogs should not count in social welfare. Consider as well that during life Helmsley was free to spend as much of her money for the care of dogs as she wished.<sup>270</sup> Of course, if a donative transfer—either during life or at death—entails negative externalities, these externalities may provide an independent justification for restricting the transfer.<sup>271</sup> But, from an economic perspective, the idiosyncratic or objectionable nature of a donor's preferences would not, by itself, provide a legitimate justification for intervening in a donor's disposition of property.

This type of example, while relatively rare, may illustrate one limitation of the economic approach. Economic analysis assumes that preferences are subjective and does not question an individual's preferences. Therefore, unless a donor is imposing external harm on others, there is no economic justification for second-guessing the substance of the donor's disposition. To be sure, there are strong policy reasons for why granting courts broad authority to second-guess the choices of donors might be problematic. Having courts regularly exercise their discretion in evaluating whether gifts are "socially desirable" would entail significant information costs and administrative costs.<sup>272</sup> Even if courts were institutionally capable of making this determination at a reasonable cost, preventing donors from circumventing such limitations would involve substantial enforcement costs.<sup>273</sup> Because courts may have difficulty weighing the social costs and benefits of each gift, the law typically defers to the donor's intent. But, in

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worth more than \$4 billion in 2012 (although the courts had ruled that the trustees were not required to use the funds in the charitable trust only for the care of dogs). *Id.*

268. *Cf.* Kaplow & Shavell, *supra* note 103, at 418–31 (“[T]he arguments that are usually presented against crediting objectionable preferences are problematic.”).

269. *See id.* (“Under a welfare economic analysis, any actual preference is given weight because it reflects an individual's actual well-being; there is no a priori basis under welfare economics for ignoring certain preferences.”).

270. Comparing inter vivos gifts and testamentary gifts is often illuminating in evaluating the potential justifications for restricting testamentary freedom. If a certain type of gift (e.g., gifts for the care of dogs) is legally permissible during life, then the question is under what circumstances, if any, the same gift should not be permissible at death. Other examples in which this distinction may be relevant are conditional gifts, *see infra* text accompanying note 286, and the destruction of property, *see infra* notes 308–09, 315 and accompanying text.

271. *See supra* Part III.A.2; *see also* Kaplow & Shavell, *supra* note 103, at 427–29 (suggesting that externalities is one reason that “satisfying certain types of preferences may be counterproductive in terms of the overall well-being of members of society”).

272. *Cf.* Hirsch & Wang, *supra* note 28, at 12 n.42 (noting that an approach “giving courts (instead of testators) discretion to divide estates . . . would . . . entail substantially higher information and administrative costs”).

273. *Cf. id.* at 11 (“A secondary justification for the right of testation is that it would in practice be difficult to curtail. Were lawmakers to rescind the power of the will, testators would find other, less efficient ways to direct the distribution of their wealth.”).

extreme cases, the divergence between a donor's private interest and the social interest could justify modifying a gratuitous transfer at death.<sup>274</sup>

#### IV. LEGAL LIMITATIONS ON TESTAMENTARY FREEDOM

Having explored the primary justifications for restricting testamentary freedom—both legitimate (imperfect information, negative externalities, and intergenerational equity) and illegitimate (maximizing the donees' ex post interests and ignoring a donor's idiosyncratic preferences), this Article applies these justifications to evaluate the law's limitations on the freedom of testation. The objective is to investigate the extent to which existing law converges with or diverges from these economic justifications. Throughout the analysis, I also suggest ways in which legislatures and courts could incorporate economic insights into law reform and judicial review.

##### A. Three Contested Examples

I begin by analyzing three examples involving dead hand control: (1) conditional bequests and incentive trusts, (2) the destruction of property at death, and (3) trust modification and termination.

##### 1. Conditional Bequests and Incentive Trusts

Historically, donors have included a wide variety of conditions in their bequests.<sup>275</sup> In modern estate planning, "conditional gifts . . . are typically made in trust," i.e., "incentive trusts."<sup>276</sup> Among the most common types of conditions in trusts are incentives for educational attainment, conditions based on deeply held moral and religious beliefs, and incentives for work and productivity.<sup>277</sup>

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274. Another example would be gifts that are racially discriminatory. Gifts involving discrimination entail negative effects on others, and these negative externalities provide a justification for prohibiting such gifts. See *supra* notes 229–30 and accompanying text. However, even assuming the "benefits" to the donor of discriminating exceed the social costs of the donor's discrimination, society might prohibit the gift on the basis that such "benefits" should not count in social welfare. See John J. Donohue, *Antidiscrimination Law*, in 2 HANDBOOK OF LAW AND ECONOMICS, *supra* note 16, at 1387, 1418 ("The moral judgment that discriminatory preferences should not enter the social welfare calculus might be analogized to the standard philosophical argument that malicious preferences—those benefits that derive from the suffering of others—must be outside the welfare calculus."); cf. Shelly Kreiczer Levy & Meital Pinto, *Property and Belongingness: Rethinking Gender-Biased Disinheritance*, 21 TEX. J. WOMEN & L. 119, 119 (2011) (arguing that "the law should not protect gender-biased bequests").

275. For example, testators may include conditions that discourage a surviving spouse from remarrying, see, e.g., *In re Estate of Robertson*, 859 N.E.2d 772 (Ind. Ct. App. 2007), prohibit a child from renting property while married to a specific person, see, e.g., *In re Estate of Owen*, 855 N.E.2d 603 (Ind. Ct. App. 2006), and encourage a devisee to marry a person of a particular religion. On conditional bequests, see generally Hirsch, *supra* note 49.

276. DUKEMINIER & SITKOFF, *supra* note 90, at 9–10. On incentive trusts, see Marjorie J. Stephens, *Incentive Trusts: Considerations, Uses, and Alternatives*, 29 ACTEC J. 5 (2003), and Tate, *supra* note 168.

277. See Tate, *supra* note 168, at 453.

To illustrate, consider the gift at issue in the classic case of *Shapira v. Union National Bank*.<sup>278</sup> In *Shapira*, the testator, Dr. David Shapira, left a share of his residuary estate to his son, Daniel, provided that “he is married at the time of my death to a Jewish girl whose both parents were Jewish,” or that, within seven years after the testator’s death, he marries “a Jewish girl whose both parents were Jewish.”<sup>279</sup> Dr. Shapira provided a gift over: if Daniel was not so married after seven years, Daniel’s share was to go to the State of Israel.<sup>280</sup>

In rejecting Daniel’s claim that the restrictions upon marriage in the will were unconstitutional or contrary to public policy, the court considered whether this partial restraint on marriage was reasonable. In making this determination, the court analyzed, among other things, Daniel’s age (21) and whether he had a “reasonable latitude of choice” of eligible women.<sup>281</sup> Ultimately, the court concluded that “public policy should not, and does not preclude the fulfillment of Dr. Shapira’s purpose, and that in accordance with the weight of authority in this country, the conditions contained in his will are reasonable restrictions upon marriage, and valid.”<sup>282</sup>

From an ex post perspective, Daniel’s claim seems strong and the court’s conclusion seems erroneous. In challenging the condition, Daniel clearly preferred to receive his share of the estate outright, rather than subject to any conditions, including conditions on whom he could or could not marry. He believed that the condition in his father’s will was unreasonable, especially given his fundamental right to marry, and he argued that his father’s dead hand should not interfere with or control such a personal and important decision.

Several scholars are sympathetic to Daniel’s dilemma. Posner suggests that, in cases like *Shapira*, perhaps judges should have the power to modify conditions on testamentary gifts using a doctrine like *cy pres*:

Consider . . . the possibilities for modification that would exist if the gift were inter vivos rather than testamentary. As the deadline approached, the son might come to his father and persuade him that a diligent search had revealed no marriageable Jewish girl who would accept him. The father might be persuaded to grant an extension or otherwise relax the condition. If the father is dead, this kind of “recontracting” is impossible, and the presumption that the condition is a reasonable one fails. This argues for applying the *cy pres* approach in private as well as charitable trust cases . . .<sup>283</sup>

In addition, in analyzing testamentary restraints on conjugal and religious choices—what he describes as “posthumous meddling”—Jeffrey Sherman

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278. 315 N.E.2d 825 (Ohio Ct. Com. Pl. 1974).

279. *Id.* at 826.

280. *Id.*

281. *Id.* at 831.

282. *Id.* at 832.

283. POSNER, *supra* note 19, at 699.

argues that a condition like the one in *Shapira* should be per se invalid.<sup>284</sup> Sherman contends that “a blanket rule invalidating all testamentary restraints that condition bounty on the legatee’s ‘proper’ choice of spouse is simpler and more predictable in its application, and more principled in its foundation, than the current judicial response.”<sup>285</sup>

The views of Posner and Sherman appear to be consistent with the modern trend regarding conditional bequests and incentive trusts. In 1974, at the time of the *Shapira* decision, it may have been true that the “great weight of authority in the United States” was that “gifts conditioned upon the beneficiary’s marrying within a particular religious class of faith are reasonable.”<sup>286</sup> Now, by contrast, the *Restatement (Third) of Trusts* invalidates trusts that are “contrary to public policy”<sup>287</sup> and suggests that these types of cases are “unfortunate.”<sup>288</sup>

From an ex ante perspective, are there other considerations that may be relevant? Of course, the testator, Dr. David Shapira, as well as similarly situated testators, might prefer for the court to enforce these types of conditions. But one question might be: what would Dr. Shapira have done ex ante if he had known or believed a court would not enforce such a condition ex post? Consider three possible scenarios. First, Shapira might have made the same bequest to his son Daniel outright in fee simple, i.e., without any conditions. Second, to circumvent the court’s refusal to enforce the condition, Shapira may have relied upon a secret trust, in which another person would hold property for Daniel’s benefit and distribute the property to Daniel in accordance with Shapira’s prior instructions. Third, Shapira may have chosen to leave Daniel no gift or a much smaller bequest.

From the ex ante perspective, i.e., at the time that Dr. Shapira is deciding how to structure his gift, both Daniel and his father may be better off if the law does not prohibit the condition. By assuring Shapira and other donors that a court will enforce the condition, the law at least gives Daniel and other donees an option to comply with the condition. If the condition is unenforceable, Daniel may have no choice at all, because David may decide to structure the bequest differently and leave Daniel nothing at all. In this case, if Shapira and his son would have negotiated in advance, which would Daniel have chosen: having an option to comply with and thereby receive the gift, or complete disinheritance? If Daniel would prefer an option to

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284. Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273, 1275.

285. *Id.* at 1322.

286. *Shapira*, 315 N.E.2d at 829.

287. RESTATEMENT (THIRD) OF TRUSTS § 29(c) (2003).

288. *Id.* Other states retain the traditional approach. See, e.g., *In re Estate of Feinberg*, 919 N.E.2d 888 (Ill. 2009) (concluding that a trust clause providing that a grandchild would be considered deceased for trust purposes if he married outside the Jewish faith did not violate public policy). Similarly, Senator Joseph Lieberman, as executor of his uncle’s \$48 million estate, had to decide whether to enforce a restriction that would have disinherited two of his cousins for marrying persons who were not born Jewish. See Phil Kuntz & Bob Davis, *A Beloved Uncle’s Will Tests Diplomatic Skills of Joseph Lieberman—Document Disinherits Children Who Failed Religious Test*, WALL ST. J., Aug. 25, 2000, at A1.



comply over disinheritance, then a court's refusing to enforce the conditional gift may make Daniel, as well as his father, worse off. In addition, during his life, Shapira could have given the same conditional gift to his son, even if he was unwilling to renegotiate the condition.<sup>289</sup>

Posner himself recognizes that the applicable legal rule may affect how donors structure their gifts at the outset. He notes, "The strongest objection to these paternalistic interventions is that in the long run, as testators 'wise up' to the courts' policy of refusing to enforce conditions that the judges deem unreasonable, they will curtail bequests."<sup>290</sup> He explains, "The refusal of courts to enforce such conditions will not make such people change their minds, but only change their wills."<sup>291</sup> Thus, in cases like *Shapira*, facilitating donative intent may be consistent not only with maximizing the donor's interest but also with promoting social welfare.<sup>292</sup> Indeed, Daniel himself, as well as similarly situated donees, might benefit if the court enforces this type of conditional bequest.<sup>293</sup>

## 2. Destruction of Property at Death<sup>294</sup>

One of the most extraordinary assertions of dead hand control arises in cases involving the "right to destroy" property at death.<sup>295</sup> In a few cases, a

289. I thank Barry Cushman for a number of insightful comments about *Shapira*.

290. POSNER, *supra* note 19, at 700.

291. *Id.*

292. Of course, it is possible that intervening in such cases could increase social welfare, if the donor has imperfect information (in which case, intervention might be consistent with testamentary freedom) or the gift entails a significant negative externality (in which case, there may be a legitimate justification for overriding testamentary freedom). On the latter possibility, see *supra* note 231 and accompanying text. Moreover, even if invalidating a condition decreases the donor's utility, if the donor still gives the gift outright to the donee, it is possible that social welfare may increase if the increase in the donee's utility exceeds the decrease in the donor's utility. See *supra* note 67.

293. Cases involving university donors who restrict the use of donations are similar to conditional gifts. In such cases, a donor, donor's estate, or donor's family have attempted to enforce conditions on how universities may use a donation, with varying degrees of success. Compare Elizabeth Mehren, *Yale To Return Bass' \$20-Million Donation*, L.A. TIMES (Mar. 15, 1995), [http://articles.latimes.com/1995-03-15/news/mn-43008\\_1\\_bass-family](http://articles.latimes.com/1995-03-15/news/mn-43008_1_bass-family), with Matt Westmoreland, *University Gains Control over Robertson Endowment in Settlement*, DAILY PRINCETONIAN (Dec. 1, 2008), <http://dailyprincetonian.com/news/2008/12/university-gains-control-over-robertson-endowment-in-settlement/>. In other cases involving university donors, courts may refuse to enforce a condition that is racially discriminatory. Compare *Tenn. Div. of the United Daughters of the Confederacy v. Vanderbilt Univ.*, 174 S.W.3d 98 (Tenn. Ct. App. 2005) (enforcing condition on a gift to Vanderbilt University that required a dormitory to be named "Confederate Memorial Hall"), with *Coffee v. William Marsh Rice Univ.*, 408 S.W.2d 269 (Tex. Civ. App. 1966) (voiding trust provisions establishing Rice as a free institution for the "white inhabitants" of Texas).

294. In an earlier article, I discuss why ex ante analysis may be relevant in analyzing the issue of destruction of property at death. Much of the following section incorporates that earlier discussion of this issue. See Kelly, *supra* note 29, at 882–85.

295. In recent years, several scholars have analyzed an owner's right to destroy property. See, e.g., Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781 (2005); see also JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, *WILLS, TRUSTS AND ESTATES* 37–38 (8th ed. 2009); JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* (1999); SHAVELL, *supra* note 10, at 68–69.

testator has instructed an executor to destroy the testator's home or other buildings.<sup>296</sup> For example, in *Eyerman v. Mercantile Trust Co.*,<sup>297</sup> Louis Woodruff Johnston owned a home in an affluent neighborhood of St. Louis, Missouri. Johnston died on January 14, 1973, and by her will directed her executor to destroy her home, sell the land, and transfer the proceeds to her estate.<sup>298</sup> Plaintiffs, owners of neighboring parcels, objected to this provision of Johnston's will, arguing, among other things, that razing Johnston's home would adversely affect their property rights and be contrary to public policy.<sup>299</sup>

Ultimately, the court ruled in favor of the neighbors, concluding that, by mandating that the executor enforce the provisions of the will, "all are harmed and only the caprice of the dead testatrix is served."<sup>300</sup> The court reasoned: "Destruction of the house harms the neighbors, detrimentally affects the community, causes monetary loss in excess of \$39,000.00 to the estate and is without benefit to the dead woman."<sup>301</sup> The court added, "A well-ordered society cannot tolerate the waste and destruction of resources when such acts directly affect important interests of other members of that society."<sup>302</sup>

Perhaps more common are situations in which the testator has an interest in destroying personal property, such as private papers or diaries,<sup>303</sup> unpublished manuscripts,<sup>304</sup> or unfinished symphonies.<sup>305</sup> For example, Justice Hugo Black believed the "private notes of the justices relating to Court conferences should not be published posthumously."<sup>306</sup> But suppose Justice Black had not destroyed his conference notes before death and that his will had directed his executor to destroy his notes. The question is: "Should a court order destruction of the notes, which might have enormous value to a Court historian?"<sup>307</sup> Or would facilitating freedom of disposition

296. See, e.g., *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 211 (Mo. Ct. App. 1975) (examining a testator's direction to an executor "to cause our home . . . to be razed and to sell the land upon which it is located"); *In re Pace*, 400 N.Y.S.2d 488, 490 (Sur. Ct. 1977) (discussing a settlor's order to a trustee to raze all buildings on two properties other than garage and tool shed); cf. *In re Scott's Will*, 93 N.W. 109, 109 (Minn. 1903) (confronting a testator's order to an executor to destroy "money or cash or other evidence of credit").

297. 524 S.W.2d at 210.

298. *Id.* at 211.

299. *Id.*

300. *Id.* at 214.

301. *Id.*

302. *Id.* at 217.

303. See Strahilevitz, *supra* note 295, at 812 ("The destruction of diaries and other papers is commonplace, even when those written works have enormous economic value." (citing *Nixon v. United States*, 978 F.2d 1269, 1279-80 (D.C. Cir. 1992))).

304. See POSNER, *supra* note 19, at 699-700; see also DUKEMINIER & SITKOFF, *supra* note 90, at 15.

305. See DUKEMINIER & SITKOFF, *supra* note 90, at 15.

306. *Id.* at 37; see also SAX, *supra* note 295, at 93-116 (discussing papers of the Supreme Court justices); ALEXANDRA K. WIGDOR, *THE PERSONAL PAPERS OF SUPREME COURT JUSTICES: A DESCRIPTIVE GUIDE* 31-34 (1986) (discussing the justices' collections of personal and professional papers and noting that several justices, including Owen Josephus Roberts and Edward Douglas White, purposely destroyed their papers).

307. See DUKEMINIER & SITKOFF, *supra* note 90, at 37.

to this extent represent the triumph of the dead hand over the lives of the living? Recent cases suggest there is a general trend among the courts *not* to allow testators to destroy socially valuable property at death.<sup>308</sup>

Ex post, there is a plausible justification for distinguishing between destruction of property during life, which the law generally permits, and destruction of property at death, which courts increasingly do not permit. During life, owners directly internalize the burdens and benefits of their actions. Thus, it is usually safe to assume that an owner will destroy property only if he or she believes the benefits of doing so outweigh the costs.<sup>309</sup> By contrast, it would appear that, after death, the owner no longer internalizes the burdens and benefits of her actions. Thus, an owner might destroy property once dead, even if others might benefit from the property. In other words, the destruction of property at death might entail waste.<sup>310</sup>

Ex ante, however, there are additional considerations. First, if a court is unwilling to allow an owner to destroy property at death, the owner may experience a loss during life.<sup>311</sup> Justice Black, for example, may have experienced anxiety about the possible publication of his notes. Second, knowing a court will not enforce such a provision, the owner may choose to destroy the property during life (i.e., sooner than the owner otherwise would have destroyed the property).<sup>312</sup> Justice Black died shortly after destroying his notes,<sup>313</sup> but suppose that, after destroying his notes, he had recovered, remained on the Supreme Court, and wished to consult the notes he had destroyed. Third, an owner's inability to destroy property at death may reduce the incentive to create property during life.<sup>314</sup> Justice Black (or other justices) may decide not to take notes during the Court's conferences. Fourth, prohibiting destruction could alter how the testator or other parties act and speak today. Justice Black's chief concern was that posthumously publishing the justices' notes might adversely affect the Court's deliberative

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308. See Strahilevitz, *supra* note 295, at 796 (“Based on a reading of recent judicial opinions, it appears that the conventional wisdom has turned against permitting a property owner to destroy valuable property.”).

309. See MERRILL & SMITH, *supra* note 96, at 518.

310. See Strahilevitz, *supra* note 295, at 796 (“Concern about wasting valuable resources is, by far, the most commonly voiced justification for restricting an owner's ability to destroy her property.” (citing Edward J. McCaffery, *Must We Have the Right To Waste?*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 76 (Stephen R. Munzer ed., 2001))).

311. See SHAVELL, *supra* note 10, at 68; see also DUKEMINIER ET AL., *supra* note 295, at 37 (asking rhetorically: “[I]f the testator expects that her wishes for post-death destruction of her property will not be followed, will she suffer a loss (in money or pleasure) during life from knowing that her destructive wishes will not be honored after her death?”).

312. See POSNER, *supra* note 19, at 549 (“In the case of the direction to destroy the art work, a testator can destroy the work himself if he doesn't think the direction will be enforced.”); cf. *supra* note 183 and accompanying text (discussing the “King Lear problem”).

313. See DUKEMINIER & SITKOFF, *supra* note 90, at 14.

314. Cf. SHAVELL, *supra* note 10, at 65 (interfering with bequests “lowers . . . incentives to work” because a “person will not work as hard to accumulate property if he cannot then bequeath it as he pleases”).

process.<sup>315</sup> In any event, a testator may internalize the costs of destruction, even destruction after death, because the testator bears the opportunity costs of not selling a remainder interest in the property during life.<sup>316</sup>

Of course, there may be other economic justifications for restricting a testator's freedom to destroy property at death. Perhaps a testator did not foresee or failed to specify all potential contingencies and, due to an unforeseen or unprovided-for contingency, destruction is inconsistent with the testator's probable intention.<sup>317</sup> Or maybe, as in *Eyerman*, destroying the property will impose harmful effects on neighbors.<sup>318</sup> Perhaps future generations value the property's existence more than the testator values its destruction and there is no market mechanism to facilitate a mutually beneficial exchange.<sup>319</sup> Each of these economic justifications may provide a legitimate reason for disallowing a person to destroy property at death. However, it is impossible to evaluate a testator's "right to destroy" property at death in particular, or dead hand control in general, without incorporating *ex ante* considerations into the analysis.<sup>320</sup>

### 3. Trust Modification and Termination

The legal systems of the United Kingdom and United States embody very different perspectives on wealth transmission through donative trusts. Representative of these differences are the legal rules governing trust modification and termination. In either legal system, the settlor has the ability not only to modify or terminate a revocable trust but also to modify or terminate an irrevocable trust if the settlor and all the beneficiaries agree. But suppose, as is often the case, that a settlor refuses to consent or is unable to consent (e.g., because the settlor is dead). The United Kingdom and United States then diverge on a fundamental question: Are the beneficiaries permitted to modify or terminate an irrevocable trust if all the beneficiaries—but not the settlor—agree to do so?

In the United Kingdom, if all the beneficiaries consent, the law permits trust modification or termination. The doctrine is well established, having

315. See JOHN PAUL FRANK, *INSIDE HUGO L. BLACK: THE LETTERS* 61–62 (2000); see also WIGDOR, *supra* note 306, at 48 (reporting that Justice Black's son recalled that his father believed that "reports by one Justice of another's conduct in the heat of a difference might unfairly and inaccurately reflect history").

316. See SHAVELL, *supra* note 10, at 68 ("[T]he detriment to the living due to dead hand control of property is not ignored by a person who wants dead hand control, but rather is taken into at least implicit account by such a person."); see also Strahilevitz, *supra* note 295, at 840.

317. See *supra* Part III.A; see also POSNER, *supra* note 19, at 699–700; SHAVELL, *supra* note 10, at 70.

318. See *supra* Part III.B; see also *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 214 (Mo. Ct. App. 1975) ("Destruction of the house harms the neighbors . . .").

319. See *supra* Part III.C. Note, however, that this rationale generally does not limit a testator's right to destroy property during life, except in certain limited circumstances such as historical preservation, endangered species, and an artist's moral rights.

320. See Strahilevitz, *supra* note 295, at 808 ("[An] *ex ante* perspective can be determinative when society must decide whether to permit or prohibit the destruction of certain kinds of property.").

been articulated almost two centuries ago in *Saunders v. Vautier*.<sup>321</sup> In *Saunders*, Richard Wright executed a will and testamentary trust leaving his East India Stock in trust for the benefit of Daniel Wright Vautier, with instructions to distribute the principal and accumulated interest to Vautier once he attained the age of twenty-five.<sup>322</sup> At age twenty-one, Vautier, eager to obtain the stock (ultimately worth £2000 plus interest, then a considerable sum),<sup>323</sup> rather than the £100 per year the court had awarded as maintenance, petitioned the court and sought termination of the trust. In ruling for Vautier, the court held that a beneficiary can terminate a trust if all the beneficiaries (here, just Vautier) are competent adults who consent to terminating the trust.<sup>324</sup>

In contrast, in the United States, even if all the beneficiaries agree to modify or terminate a trust, the law does not necessarily permit modification or termination. The traditional American rule is that “a trust cannot be terminated or modified on petition of all the beneficiaries if doing so would be contrary to a *material purpose* of the settlor.”<sup>325</sup> This “material purpose” test is widely known as the *Clafin* doctrine because of its origins in *Clafin v. Clafin*,<sup>326</sup> the American counterpart to *Saunders*.<sup>327</sup> In *Clafin*, as in *Saunders*, the beneficiary, Adelbert Clafin, sued to terminate an irrevocable trust. Like Vautier, Clafin claimed that, because he had reached the age of twenty-one and was the sole beneficiary of the trust, he was entitled to the corpus, even though he had not yet reached thirty, the age the settlor had specified.<sup>328</sup> Unlike the English court in *Saunders*, the American court in *Clafin* refused to permit the beneficiary to terminate the trust prematurely; allowing the beneficiary to do so, the court reasoned, would violate the settlor’s intent.<sup>329</sup>

What explains this doctrinal divergence on trust modification and termination in the United Kingdom (and nearly all Commonwealth countries) and the United States?<sup>330</sup> The conventional explanation for the

321. (1841) 49 Eng. Rep. 282 (Ch.). The rule in *Saunders v. Vautier* remains good law. Indeed, in 1958, Parliament extended the scope of the rule in enacting the Variation of Trusts Act, 6 & 7 Eliz. 2, c. 53, § 1 (1958) (U.K.), which establishes that “a court may consent to modification or termination of a trust on behalf of incompetent, minor, or unborn beneficiaries if the court finds it beneficial to those beneficiaries.” DUKEMINIER & SITKOFF, *supra* note 90, at 718; *see also* Joshua Getzler, *Transplantation and Mutation in Anglo-American Trust Law*, 10 THEORETICAL INQUIRIES L. 355, 371 (2009).

322. *Saunders*, 49 Eng. Rep. at 282.

323. Wright died in 1832, and £2000 then converts to over \$200,000. *See* Eric Nye, *Pounds Sterling to Dollars: Historical Conversion of Currency*, UNIV. WYO., <http://uwacadweb.uwyo.edu/numimage/currency.htm> (last visited Nov. 22, 2013).

324. *See Saunders*, 49 Eng. Rep. at 282.

325. DUKEMINIER & SITKOFF, *supra* note 90, at 719.

326. 20 N.E. 454 (Mass. 1889).

327. Justice Walbridge Field, writing for the Supreme Judicial Court of Massachusetts, cites *Saunders*, as well as several other English cases, in his opinion. *See id.* at 455.

328. *See id.*

329. *Id.* at 456.

330. According to a study by Paul Matthews, the rule emanating from *Saunders* is found “not only in England, but also in nearly all Commonwealth countries.” Paul Matthews, *The Comparative Importance of the Rule in Saunders v. Vautier*, 122 L.Q. REV. 266, 282 (2006)

divergence is that these legal systems, despite their common origin, have conflicting views of dead hand control and the question of whose property is it—the settlor’s or the beneficiaries’—once the settlor has died.<sup>331</sup> For the English, the donor’s intention is “not . . . of any relevance whatever,” whereas for the Americans, the donor’s intention “ought to be carried out.”<sup>332</sup> And, whereas for the English, “the beneficiaries are entitled” to use the trust property, for the Americans, “a testator has a right to dispose of his own property.”<sup>333</sup>

Ultimately, this explanation is not satisfying, however. It may be true that English law disregards the donor’s intention, while American law privileges intention as the controlling consideration. It also may be true that English law considers the trust to be the beneficiaries’ property, while American law considers it to be, functionally, the settlor’s property.<sup>334</sup> But what explains *these* underlying differences? Is there any divergence in the mode of legal reasoning or policy analysis that might result in such disparate outcomes on the same issue? My hypothesis is that, in attempting to explain these differences, the distinction between ex ante and ex post considerations is relevant.<sup>335</sup> Specifically, the competing approaches to the issue of trust modification and termination may stem from a failure to identify and distinguish between the ex ante and ex post perspective.

Ex post, the English view (*Saunders*) has a certain degree of plausibility. Once a settlor is dead, it seems as if the beneficiary or beneficiaries, assuming they all agree, should be permitted to terminate the trust and utilize the property in whatever manner they deem best. Not permitting modification or termination would mean the property would not be devoted to its highest valued use. The extension of this approach in the Variation of Trusts Act, which allows English courts to consent on behalf of incompetent, minor, or unborn beneficiaries, might be beneficial as well.<sup>336</sup> Again, under these circumstances, without modification or termination, the

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(citing articles that discuss *Saunders*’s influence in Australia, Bailiwick of Jersey, Canada, the Caribbean, Ceylon, Ireland, Nigeria, and South Africa).

331. See *DUKEMINIER & SITKOFF*, *supra* note 90, at 718 (“What has happened in England and the Commonwealth is that, after a trust becomes irrevocable, the trust property is regarded as belonging to the beneficiaries, and the dead hand continues to rule only by sufferance of the beneficiaries.”).

332. Compare *Goulding v. James*, (1997) 2 All E.R. 239 (C.A.) at 252 (Eng.) (Gibson, L.J.), with *Clafin v. Clafin*, 20 N.E. 454, 456 (Mass. 1889) (Field, J.). Lord Justice Mummery’s opinion in *Goulding* is also in accord with the traditional English view. *Goulding*, 2 All E.R. at 247 (Mummery, L.J.) (“The principle recognises the rights of beneficiaries . . . to overbear and defeat the intention of a testator or settlor.”).

333. Compare *Goulding*, 2 All E.R. at 252 (Gibson, L.J.), with *Clafin*, 20 N.E. at 456 (Field, J.).

334. For a recent examination of related issues in the United States, particularly in the context of trust investment law, see John H. Langbein, *Burn the Rembrandt? Trust Law’s Limits on the Settlor’s Power To Direct Investment*, 90 B.U. L. REV. 375, 378–85 (2010).

335. Cf. *Sitkoff*, *supra* note 15, at 657–58 (describing trust modification and termination as a “useful example” of “how the law balances the ex post preferences of the beneficiaries with the ex ante wishes of the settlor”).

336. See Variation of Trusts Act, 6 & 7 Eliz. 2, c. 53, § 1 (1958) (U.K.).

beneficiaries would not be able to use the property in the manner they deem best, meaning the property may not be devoted to its highest use.

Yet, once ex ante considerations are incorporated into the analysis, the American view (*Claflin*) arguably has some merit. If a settlor knows the beneficiaries can easily convince a court to modify or terminate the trust once the settlor has died, the settlor may receive less satisfaction during life or have less incentive to accumulate property. Moreover, the settlor may anticipate the possibility of a court's modifying or terminating the trust and alter the structure or timing of the gift. Or the settlor may decide not to give the gift at all. Indeed, once ex ante considerations are incorporated, beneficiaries may themselves favor the American rule for precisely this reason. Sitkoff points out that "though a particular beneficiary might prefer the power to terminate the trust once it is established, the *Claflin* doctrine is advantageous to potential beneficiaries as a class because it increases the willingness of grantors to create a trust in the first place."<sup>337</sup>

Of course, there are situations in which modifying or terminating an irrevocable trust might be beneficial, even from the ex ante perspective. One situation is if the settlor has died but a contingency arises that the settlor could not or did not anticipate.<sup>338</sup> Countless circumstances may arise, and it would be difficult, if not impossible, for the donor to anticipate every potential contingency. Even if it were possible, the costs of expressly specifying each contingency could outweigh the benefits of attempting to do so.<sup>339</sup> If the provisions of the trust are incomplete, the inability to modify the trust would mean a failure to carry out the donor's probable intent, including what the donor would have specified if the donor had the ability and resources to address each contingency explicitly.<sup>340</sup> For this reason, authorizing perpetual trusts may be especially problematic, at least in the absence of some mechanism for judicial modification.<sup>341</sup>

Incorporating the ex ante perspective is useful not only for engaging in a comparative inquiry of trust modification and termination in the United Kingdom and United States. The American rule, based on *Claflin*, has itself been subject to varying degrees of criticism,<sup>342</sup> and the *Restatement (Third) of Trusts* and *Uniform Trust Code* have embraced different approaches. Section 65 of the *Restatement (Third) of Trusts* permits modification or termination in cases in which doing so would be inconsistent with the "material purpose" of a trust.<sup>343</sup> The UTC permits modification or termination under certain circumstances without the consent of all the beneficiaries.<sup>344</sup> In addition, a number of state reforms—some modeled on

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337. Sitkoff, *supra* note 15, at 659.

338. *See supra* Part III.A.

339. *See id.*

340. *See id.*

341. *Cf.* CHESTER, *supra* note 28, at 47–58, 117 (advocating liberal modification of trusts).

342. *See* Sitkoff, *supra* note 15, at 660 (noting "a strong academic and slowly emerging decisional trend toward liberalizing these rules" of trust modification and termination).

343. RESTATEMENT (THIRD) OF TRUSTS § 65 (2003).

344. UNIF. TRUST CODE § 411(e) (amended 2004), 7C U.L.A. 498 (2010).

the *Restatement*, others modeled on the UTC—have altered the traditional rules governing trust modification and termination.<sup>345</sup>

Distinguishing between *ex ante* and *ex post* considerations will be as important in evaluating these variations on *Clafin* within the United States, as in comparing the English and American approach to trust modification and termination.<sup>346</sup> At a minimum, the analysis should acknowledge that overriding a material purpose (based on a judicial determination that countervailing considerations outweigh the material purpose) or permitting modification without all the beneficiaries' consent (based on a judicial determination that any nonconsenting beneficiaries will be adequately protected) has the potential to change a settlor's incentives. And, given the risk of judicial intervention, settlors may decide to alter the structure or timing of their gifts, which may be detrimental to the beneficiaries.<sup>347</sup>

### B. Other Legal Limitations

Contemporary disputes about issues like conditional gifts and trust modification and termination illustrate the relevance of the *ex ante/ex post* distinction in evaluating restrictions on testamentary freedom. However, succession law restricts testamentary freedom in several other ways. In this section, I briefly discuss a number of these restrictions and their possible economic justifications.

First, there are several restrictions on the permissible purposes of wills and trusts. For example, a testator cannot execute a will and a settlor cannot create a trust for a purpose that is illegal.<sup>348</sup> Restrictions that discriminate invidiously based on race or other protected categories are also invalid.<sup>349</sup>

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345. See, e.g., CAL. PROB. CODE § 15403 (West 1991 & Supp. 2013) (permitting modification or termination, even if “continuance of the trust is necessary to carry out a material purpose of the trust,” if all beneficiaries consent and the “court, in its discretion, determines that the reason for [modifying or terminating the trust] . . . outweighs the interest in accomplishing a material purpose of the trust,” unless the trust contains a spendthrift provision); OHIO REV. CODE ANN. § 5804.11(D) (LexisNexis 2006 & Supp. 2013) (adopting provisions analogous to UNIF. TRUST CODE § 411, 7C U.L.A. at 497–98); see also Peter J. Wiedenbeck, *Missouri's Repeal of the Clafin Doctrine—New View of the Policy Against Perpetuities?*, 50 MO. L. REV. 805 (1985) (discussing earlier reforms to *Clafin*).

346. It is worth noting that even the recent variations on *Clafin* within the United States differ from the U.K. approach because these U.S. variations continue to emphasize the intent, or probable intent, of the settlor. See Sitkoff, *supra* note 15, at 661–63.

347. Many settlors continue to include age limitations in their trusts, like the provisions at issue in *Saunders* and *Clafin*. For example, Whitney Houston's will and testamentary trust contained limitations based on the age of her primary beneficiary, her daughter Bobbi Kristina, who was still a teenager at the time of her mother's death. See *Whitney Houston Leaves Everything to Her Daughter, Bobbi Kristina*, ABC NEWS (Mar. 7, 2012), <http://abcnews.go.com/blogs/entertainment/2012/03/whitney-houston-leaves-everything-to-her-daughter-bobbi-kristina/> (noting that, under the testamentary trust, “the 19-year-old will have to wait until she's 30 to inherit everything”).

348. See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 29(a) (“An intended trust or trust provision is invalid if . . . its purpose or performance is unlawful or . . . its performance calls for the commission of a criminal or tortious act.”).

349. See, e.g., *Evans v. Newton*, 382 U.S. 296, 302 (1966) (holding that a racial restriction in the bequest of land in trust was void under the Fourteenth Amendment); see also *supra* notes 73–74, 230–31, 274, 293 and accompanying text.



Moreover, as discussed above, the law prohibits a bequest if the gift is capricious or frivolous.<sup>350</sup> Each limitation seems justifiable because of negative externalities (consider the social costs of encouraging crime or discriminating against others) or perhaps due to idiosyncratic preferences that the law ignores or discounts.<sup>351</sup>

Second, several limitations on testamentary freedom involve family members and relatives. The spousal elective share prevents a donor from disinheriting a surviving spouse.<sup>352</sup> The law prohibits conditional bequests that create unreasonable restraints on marriage.<sup>353</sup> And courts have invalidated terms that interfere with the mother-child relationship,<sup>354</sup> sibling interaction,<sup>355</sup> and other family relationships.<sup>356</sup>

As noted above, the elective share may be necessary to prevent the external costs that a decedent can impose on the public by disinheriting a spouse.<sup>357</sup> By contrast, each state (except Louisiana) allows donors to disinherit their children, including minor children, even though a similar type of externality might exist.<sup>358</sup> It is an empirical question how often such disinheritance occurs in the United States. It seems likely that most donors provide for their children directly or give property to their surviving spouse with the expectation that the spouse will use this property to provide for their children. Moreover, even if a decedent does not provide for children at all, the default rule allowing filial disinheritance is based on an expectation that, in most of the remaining cases, a surviving spouse can utilize the spousal elective share to support minor children.<sup>359</sup>

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350. See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. m (“It is against public policy to enforce a trust provision that would divert distributions or administration from the interests of the beneficiaries to other purposes that are capricious or frivolous.”).

351. Sometimes legal intervention is justifiable because of imperfect information, as well as negative externalities, as in the case of the “slayer” rules governing a murdering heir. See POSNER, *supra* note 19, at 693 (“The rule against allowing the testator’s murderer to inherit thus serves the by now familiar function of reading into a contract or conveyance an implied term to govern remote contingencies.”).

352. See, e.g., UNIF. PROBATE CODE § 2-202, 8 U.L.A. at 89–90 (Supp. 2013).

353. See, e.g., *In re Estate of Feinberg*, 919 N.E.2d 888 (Ill. 2009); see also *supra* Part IV.A.1 (discussing *Shapira*).

354. See, e.g., *In re Carples’ Estate*, 250 N.Y.S. 680, 681–89 (Sur. Ct. 1931).

355. See, e.g., *Girard Trust Co. v. Schmitz*, 20 A.2d 21, 27–37 (N.J. Ch. 1941).

356. See RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. j (“The policy against undermining family relationships applies as well to trust provisions that discourage a person from living with or caring for a parent or child or from social interaction with siblings.”).

357. See *supra* notes 9, 75, 233–34 and accompanying text.

358. See *supra* note 9 and accompanying text.

359. Cf. Christina Donato Saler, Note, *Pennsylvania Law Should No Longer Allow a Parent’s Right to Testamentary Freedom To Outweigh the Dependent Child’s “Absolute Right to Child Support,”* 34 RUTGERS L.J. 235, 254 (2002) (discussing how, even if “the deceased parent of a nuclear family may have disinherited his children,” marital children can receive “indirect financial support, i.e., spousal elective share”). However, Langbein argues that even the spousal elective share may do more harm than good. He concludes that the intentional disinheritance of spouses is relatively rare, whereas later-in-life marriages, which can alter a distribution of property due to the elective share, are increasingly common. See John H. Langbein, Professor of Law, *The Uniform Probate Code: Remaking of American Succession Law* (Oct. 21, 2011), available at <http://www.youtube.com/watch?v=OiTcRdKHHI>; see also Terry L. Turnipseed, *Why Shouldn’t I Be Allowed To Leave My*

Third, the law contains several longstanding rules, including the rule against unreasonable restraints on alienation and rules against perpetuities or accumulations, that restrict the transfer or accumulation of property over time. The rule against unreasonable restraints on alienation limits the ability of a donor to transfer property to a donee while placing significant restrictions on the donee's ability to transfer the property to others.<sup>360</sup> The rule against perpetuities invalidates certain contingent interests that may vest too far into the future, and thereby prevents donors from exercising control over great-grandchildren and their descendants.<sup>361</sup> The rule against accumulations in income "limits the time during which a settlor may direct the trustee to accumulate and retain income in trust."<sup>362</sup>

Overall, the rule against unreasonable restraints on alienation and the rule against perpetuities may be necessary because of imperfect information. A rule disfavoring restraints on alienation also may reduce the risk of negative externalities in transferring property, especially if various types of complex restraints might entail third-party information costs.<sup>363</sup> Finally, the rule against accumulations in income may prevent external effects that could arise from certain individuals retaining concentrated wealth.<sup>364</sup>

Fourth, there are several restrictions on testamentary freedom that are based on changed circumstances, including equitable deviation, trustee removal, and *cy pres*. Under the equitable deviation doctrine, a court may "modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust."<sup>365</sup> The justification for allowing modification due to unanticipated circumstances is based on imperfect information. Moreover, the UTC requires that "[t]o the extent practicable, the modification must be made in accordance with the

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*Property to Whomever I Choose at My Death? (Or How I Learned To Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737, 793–94 (2006) ("With literally every single disinheritance study showing *de minimis* rates of disinheritances that are not agreed to by the spouse, elective share laws seem like some ridiculous school child's Rube Goldberg machine . . .").

360. See MERRILL & SMITH, *supra* note 96, at 563–72.

361. See *id.* at 572–92.

362. Sitkoff, *supra* note 238, at 501; see also Karen J. Sneddon, Comment, *The Sleeper Has Awakened: The Rule Against Accumulations and Perpetual Trusts*, 76 TUL. L. REV. 189 (2001).

363. See MERRILL & SMITH, *supra* note 96, at 566–67 (discussing policy reasons against restraints on alienation).

364. See Sitkoff, *supra* note 238, at 513–16 (discussing justification based on distortions due to accumulation of wealth).

365. RESTATEMENT (THIRD) OF TRUSTS § 66(1) (2003).

settlor's probable intention."<sup>366</sup> This requirement helps ensure that judicial intervention *ex post* will be consistent with the donor's wishes *ex ante*.<sup>367</sup>

Similarly, under the UTC, a court may remove a trustee if, among other things, "there has been a substantial change of circumstances . . . , the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available."<sup>368</sup> Once again, the justification for allowing trustee removal due to a change of circumstances is based on the fact that a settlor is operating with imperfect information. In addition, while the UTC requires that removal "best serves the interests of all of the beneficiaries" (an *ex post* requirement), it also permits removal only if doing so is "not inconsistent with a material purpose of the trust"—a requirement that incorporates a settlor's *ex ante* interests and incentives.<sup>369</sup>

Likewise, the doctrine of *cy pres*, which applies to charitable trusts, provides that, "if the charitable trust's specific purpose becomes *illegal, impossible, or impracticable*, the court may direct the application of the trust property to another charitable purpose that approximates the settlor's general charitable intent."<sup>370</sup> Historically, unlike donative trusts, charitable trusts could last forever. As a result, there is an even greater economic justification for giving courts some flexibility to modify charitable trusts due to a donor's imperfect information.<sup>371</sup> And, once again, this doctrine incorporates the importance of the donor's *ex ante* wishes because, as its name suggests, *cy pres* requires a court to satisfy the donor's intention "as nearly as possible."

Fifth, several recent limitations seek to restrict testamentary freedom or authorize courts to disregard donative intent if doing so is in the best interests of donees. For example, as discussed, the *Restatement (Third) of Trusts* and UTC both allow beneficiaries to modify or terminate a trust without a change of circumstances.<sup>372</sup> Likewise, the UTC allows a court to remove a trustee even in the absence of changed circumstances.<sup>373</sup> There is a potential justification for modifying or terminating a trust due to imperfect information or negative externalities. Similarly, there are circumstances in

366. UNIF. TRUST CODE § 412, 7C U.L.A. 507 (2010); *see also* RESTATEMENT (THIRD) OF TRUSTS § 66 cmt. a ("The objective is to give effect to what the settlor's intent probably would have been had the circumstances in question been anticipated.").

367. *Cf.* DUKEMINIER ET AL., *supra* note 295, at 649 ("By making modification more freely available, will the extension of equitable deviation to distributive provisions dissuade potential settlors from establishing a trust in the first place?").

368. UNIF. TRUST CODE § 706(b)(4), 7C U.L.A. at 575.

369. *Id.*

370. DUKEMINIER & SITKOFF, *supra* note 90, at 752.

371. *See* POSNER, *supra* note 19, at 696 (discussing dead hand control and *cy pres* doctrine and suggesting that, "since no one can foresee the future, a rational donor knows that his intentions might eventually be thwarted by unpredictable circumstances and may therefore be presumed to accept implicitly a rule permitting modification of the terms of the bequest in the event that an unforeseen change frustrates his original intention").

372. *See* UNIF. TRUST CODE § 411 (amended 2004), 7C U.L.A. at 497–98; RESTATEMENT (THIRD) OF TRUSTS § 65 (2003).

373. UNIF. TRUST CODE § 706(b)(4), 7C U.L.A. at 575.

which trustee removal is appropriate as the result of imperfect information. However, there is also a significant danger that a court may modify or terminate a trust, or remove a trustee, simply because doing so is in the ex post interests of donees. Disregarding a donor's intent to maximize the donees' ex post interests—without one of the legitimate justifications for restricting testamentary freedom—may be socially undesirable.

Sixth, and finally, two other fundamental limitations on the donor's ability to transfer property at death are worth noting. The first limitation, which is fairly uncontroversial, is that the donor may not transfer property to donees before the donor has satisfied her creditors.<sup>374</sup> This limitation prevents debtors from imposing external costs on others and increasing the price of credit.<sup>375</sup> The second limitation, which is more controversial, is the estate tax.<sup>376</sup> The primary economic justification for an estate tax is based on the negative externalities that might arise by allowing particular families to retain concentrated wealth across generations.<sup>377</sup> Yet, there is persistent disagreement about the magnitude of such externalities, as well as whether the potential benefits of imposing an estate tax exceed the costs of administering and enforcing it.<sup>378</sup>

#### CONCLUSION

The organizing principle of succession law is testamentary freedom. Facilitating donor intent is often consistent with maximizing social welfare, but the two are not coextensive. As a result, a perennial issue is determining the circumstances in which the legal system should intervene to alter or modify a donor's wishes on behalf of the donees, i.e., when should the lives of the living trump the wishes of the dead.

There are several economic justifications for restricting the freedom of testation, including imperfect information, negative externalities, and intergenerational equity. Given a donor's limited ability to foresee future

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374. See *DUKEMINIER & SITKOFF*, *supra* note 90, at 44 (noting that a core function of probate is that “it *protects creditors* by providing a procedure for payment of the decedent's debts”).

375. See *supra* notes 235–36 and accompanying text.

376. There is a substantial literature in law and economics on the estate tax, and exploring all of the relevant issues is beyond the scope of this Article. See *generally* POSNER, *supra* note 19, at 687–92; James R. Hines, Jr., *Taxing Inheritances, Taxing Estates*, 63 *TAX L. REV.* 189 (2009). For insight into recent political battles over the estate tax, see, for example, MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH* (2005). For a collection of essays analyzing many of the issues, see *RETHINKING ESTATE AND GIFT TAXATION* (William G. Gale et al. eds., 2001).

377. See SHAVELL, *supra* note 10, at 65 & n.61; cf. Michael J. Boskin, *An Economist's Perspective on Estate Taxation*, in *DEATH, TAXES AND FAMILY PROPERTY*, *supra* note 6, at 56, 57 (noting that a “major goal” of estate tax “has been—and continues to be—to decrease the inequality in the distribution of wealth, to thwart the concentration of economic (and with it, some argue, political) power”).

378. For a systematic approach for analyzing the costs and the benefits, see Louis Kaplow, *A Framework for Assessing Estate and Gift Taxation*, in *RETHINKING ESTATE AND GIFT TAXATION*, *supra* note 376, at 164, 164–215, and McCaffery, *supra* note 171. For an early contribution to the law-and-economics literature that identifies some of the costs of an estate tax, see Tullock, *supra* note 53.

events and the costs of specifying even foreseeable contingencies, courts may intercede to alter or interpret a gift due to unforeseen or unprovided-for events. In addition, if a donor attempts to transfer property for a purpose that is illegal (e.g., a bequest for murder) or entails other external costs (e.g., disinheriting a spouse), the law also may have a reason to intervene. Finally, if the present generation is transferring property in a way that neglects the utility of future generations, perhaps intergenerational equity also serves as a sufficient justification for restricting testamentary freedom.

However, having a court disregard a donor's intent in order to maximize the donees' ex post interests, an increasingly common reason for restricting testamentary freedom, is problematic. Doing so ignores a donor's happiness, a donor's incentive to work, save, and invest, the structure and timing of gifts, and other ex ante considerations. Interfering with a donor's ex ante wishes to maximize the donees' ex post interests is detrimental from the donor's perspective: the court is not facilitating the donor's wishes. In addition, because donors can alter their gifts, disregarding donative intent to advance the interests of particular donees may be contrary to the interests of donees as a class. Thus, restricting testamentary freedom to maximize the ex post interests of donees is often socially undesirable.

Many of the legal restrictions on testamentary freedom are consistent, or at least arguably consistent, with one or more of the economic justifications for restricting testamentary freedom. However, as discussed, there are an increasing number of legal doctrines and law reforms, from conditional bequests and incentive trusts to trust modification and termination, in which courts and commentators have endorsed doctrines that maximize the ex post benefits of donees, while failing to incorporate the ex ante incentives of donors and the many ways in which the donor's incentives can affect the donees' interests. Of course, whether intervention is warranted in any particular context depends on the specific legal doctrine at issue and the effects that intervention may have on the incentives of donors and donees. Thus, there is a need for additional analysis of succession law doctrines from an economic perspective as well as rigorous empirical study to obtain a better understanding of the effects of these doctrines on behavior. Yet, overall, if the legal system views testamentary freedom from an ex post, rather than an ex ante, perspective, the ultimate outcome may be bad for donors, bad for donees, and bad for society. In short, the living may themselves benefit if the law allows a certain degree of dead hand control.