Posthumous Meddling: An Instrumental Theory of Testamentary Restraints on Conjugal and Religious Choices

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POSTHUMOUS MEDDLING: AN INSTRUMENTALIST THEORY OF TESTAMENTARY RESTRAINTS ON CONJUGAL AND RELIGIOUS CHOICES

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In this article, Professor Sherman argues that testamentary conditions restricting the personal conduct of legatees should be prohibited. He begins the piece with a defense of testation as an institution, exploring the reasons why society permits testation at all. He rejects the economic arguments that the abolition of testation would upset the economic markets by altering property owners' investment decisions and would lead to government ownership of all property. Instead, he argues that since people desire the right to bequeath their property to their progeny, society should help them do so unless there are good reasons opposing the practice. Because it is offensive to aid the dead in controlling the personal choices of the living, Professor Sherman proposes that the law should not enforce testamentary conditions restricting conjugal and religious matters.

Professor Sherman then compares current law and the results stemming from his theory. Although courts currently examine testators' motives in deciding whether to enforce conditions inducing divorce, generally sustain conditions restricting religious choices, and deal with restraints against marriage in a variety of ways, Professor Sherman argues that none of these conditions should be enforced. Finally, he discusses what consequences should follow a court's invalidation of a condition in a will.


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Portia. I may neither choose who I would nor refuse who I dislike; so is the will of a living daughter curb'd by the will of a dead father.

William Shakespeare, *The Merchant of Venice*

Portia was not happy. By the terms of her father's will, she had to marry the first man to prevail in a rather curious lottery. Her father's will directed that each candidate for Portia's hand be shown and asked to choose one from among three caskets: one of gold, one of silver, and one of lead. One casket contained Portia's picture (the leaden casket, not to keep you in unnecessary suspense), and the first candidate to choose that casket thereby gained the hand of Portia, regardless of her inclinations in the matter.

Things looked bleak for our heroine. At the time she uttered her lament about her father's will, six suitors had already presented themselves, and the odds were high that one of the six would choose correctly—an alarming prospect for Portia, since "there is not one among them but I dote on his very absence." Happily for her, these six departed without trying their luck, presumably because Papa's will required them, before venturing, to swear that if they chose wrong, they would quit Portia's home immediately and "never... speak to lady afterward/in way of marriage." Nonetheless, Portia endured the suspense of two more unwelcome suitors, both of whom actually gave it a shot (unsuccessfully), before her true love, Bassanio, chose wisely and well.

2. See id. at act 1, sc. 2.
3. The probability that any one suitor would guess wrong was 2:3. The probability that all six would guess wrong was (2:3)^6, or 8.8%. Accordingly, there was a 91.2% probability (100% minus 8.8%) that one of the six suitors would guess correctly.
5. See id. act 1, sc. 2, lines 101-05.
6. *Id.* act 2, sc. 1, lines 41-42.
7. Some malicious gossips insist, to this day, that Portia gave Bassanio the advantage of an unfair hint, during his ordeal, by singing a song in which each of the first three lines rhymed suggestively with "lead":
   Tell me where is fancy bred,
   Or in the heart or in the head?
   How begot, how nourish'd?

   *Id.* act 3, sc. 2, lines 63-65. Imagine the challenge to Portia's rhyming skills had the correct casket been the silver.
Portia’s father’s attempt to “control her from beyond the grave” is only fictional, but similar attempts at posthumous meddling are all too real. In 1990, Leslie Combs II, a wealthy Kentucky horse breeder, left millions to a cancer research foundation on the condition that the foundation fire its executive director. In another case, a testator gave a remainder interest to his stepson only if, at the life tenant’s death, the stepson was neither living with nor supporting the stepson’s wife. And a codicil to yet another testator’s will provided that a trust interest given to the testator’s granddaughter by an earlier will was to be suspended if she “bec[ame] associated with the Roman Catholic Church, either as a member of said Church or as a Sister, or in a lesser or greater capacity in an Order of said Church, or as a student in a school or university conducted by said Church.”


9. Cf. Oscar Wilde, The Importance of Being Earnest, in The Annotated Oscar Wilde 326, 359 (H. Montgomery Hyde ed., 1982) (1895) (“[A]ccording to the terms of her grandfather’s will, Miss Cardew does not come legally of age [i.e., become free to marry without her guardian’s consent] till she is thirty-five.”).

10. The portion of the Restatement of Property dealing with conditions that purport to restrain transferees’ conduct speaks of “donative transfers” rather than merely testamentary transfers, Restatement (Second) of Property: Donative Transfers § 5.1 (1983), and, in theory, inter vivos meddling certainly is as conceivable as posthumous meddling. In fact, however, the kind of conditions with which this article is concerned is much more commonly found in testamentary trusts than in inter vivos trusts. Property owners who wish to use their wealth as a bribe to discourage their transferees from engaging in certain conduct might be embarrassed to show their hands while still alive. Consequently, litigated American cases are few in which a condition affecting beneficiaries’ conjugal or religious choices was imposed while the transferor was alive. For four examples of such rare cases, see In re 1942 Gerald H. Lewis Trust, 652 P.2d 1106 (Colo. Ct. App. 1982); Himmelfarb v. Horwitz, 536 A.2d 86 (D.C. 1987); Gard v. Mason, 86 S.E. 302 (N.C. 1915); and Harbin v. Judd, 340 S.W.2d 935 (Tenn. Ct. App. 1960). In Baker v. Hickman, 273 P. 480 (Kan. 1929), the testator, after unsuccessfully trying to persuade one of her daughters to divorce her husband, wrote a will conditioning a bequest to the daughter on the daughter’s divorcing; the mother then allegedly brandished the will “before the eyes of [the daughter] and demanded that [she] get rid of her husband.” Id. at 481.

Evidently, such inter vivos coercion was sufficiently common in 17th- and early 18th-century England to have generated statutory responses:

[A]s nothing is so apt to stifle [natural parental feeling and duty] as religious bigotry, it is enacted that if any popish parent shall refuse to allow his protestant child a fitting maintenance, with a view to compel him to change his religion, the lord chancellor shall by order of court constrain him to do what is just and reasonable. . . . [A later statute] ordains that if Jewish parents refuse to allow their protestant children a fitting maintenance suitable to the fortune of the parent, the lord chancellor on complaint may make such order therein as he shall see proper.

1 William Blackstone, Commentaries *449 (citations omitted). Sir William cites no statutes calculated to protect non-Protestant children from such financial duress.

For purposes of this article, the phrases “testamentary conditions” and “testamentary restraints” will include conditions and restraints in donative instruments operating as will substitutes, such as revocable inter vivos trusts, where the transferor intends the conditions or restraints to operate after the transferor’s death.

11. See Todd Murphy, Theories Abound on Why Will Demanded That Makr Be Fired, Courier-Journal (Louisville, Ky.), Apr. 26, 1990, at 1B.


Portia's waiting-woman tried to reconcile her to her father's matrimonial lottery by observing, "Your father was ever virtuous, and holy men at their death have good inspirations."14 And, to be sure, in Portia's case the posthumous meddling was famously fortunate. But in reality, such testamentary conditions proceed more often from spite than from benevolence and result not in connubial rejoicing but in enduring bitterness.15 One court characterized as "a will of hate" an instrument in which the testator left money in trust to four of his six siblings, conditioned on their having no communication of any kind with the other two.16 And some thought that the will of Leslie Combs II resulted from Combs's disapproval of a relationship between the devisee foundation's director and its chairman.17 According to an acquaintance, "Leslie had a mean streak in him, especially after he got old and couldn't chase girls anymore."18

Courts traditionally have upheld these testamentary conditions calculated to restrain legatees' personal conduct, unless the conditions violate public policy.19 As one might imagine, however, the courts' applica-

14. SHAKESPEARE, supra note 1, act 1, sc. 2, lines 27-28.
15. In Shapiro v. Union National Bank, 315 N.E.2d 825 (Ohio C.P. 1974), the testator's bequests to each of his two sons were conditioned on the son's marrying "a Jewish girl [both of whose] parents were Jewish." Id. at 826. In an action for a declaratory judgment brought by one of the sons, Daniel Shapiro, the validity of the condition was upheld against a charge that it constituted an unreasonable restraint upon marriage. See id. at 832. When Professors Dukeminier and Johanson decided to include the case in their estates and trusts casebook, they "asked the attorney who represented Daniel Shapiro for information about the aftermath of the case. The attorney contacted Mr. Shapiro, who declined to give any information. It was a bitter experience, he said, which he wanted to forget." JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 35 (5th ed. 1995).
16. Girard Trust Co. v. Schmitz, 20 A.2d 21, 24 (N.J. Ch. 1941). The bequests to the four favored siblings were made upon the express provision and condition that no one of them shall at any time after my death and after notice of this provision of my will shall have been made known to them by my Executor, have any communication or intercourse verbally [sic] or in writing, directly or indirectly, nor live in the same house or under the same roof with my brother Otto Schmitz, his wife or children, or my sister Emilie Schmitz Blizzard, her husband or children, except such communication as shall be absolutely necessary in the settlement of my father's estate.

Id. at 24-25.
17. See Murphy, supra note 11, at 1B; Richard Wilson, A Test of Will?, COURIER-JOURNAL (Louisville, Ky.), Apr. 28, 1990, at 7A.
18. John Lichfield, Horse-Breeder's Will Scandalises Blue Grass State, INDEPENDENT (London, Ky.), May 7, 1990, at 9. Combs's daughter dismissed as "ridiculous" the theory that the testamentary condition sprang from Combs's distress at the director's love life. See Murphy, supra note 11, at 1B.
19. The word "unless" suggests that in a challenge to the validity of a testamentary restraint, the party seeking to invalidate the provision bears the risk of nonpersuasion. The Restatement uses the conjunction similarly. See RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 5.1 (1983) ("Unless contrary to public policy or violate of some rule of law, a provision . . . designed to prevent the acquisition or retention of an interest in property in the event of any failure on the part of the transferee to comply with a restraint on personal conduct is valid.") Moreover, at least one case, citing similar language in the Restatement (First) of Property (1944), indeed held that in a challenge to the validity of a testamentary restraint against a widow's remarrying, the burden of proof lay with the party attacking the restraint. See In re Estate of Gehrt, 480 N.E.2d 151, 152 (Ill. App. Ct. 1985). In fact, however, the burden of proof is not so consistently allocated. For example, in cases of total restraints on marriage — i.e., bequests of property interests that will terminate should the legatee ever marry anyone — the Restatement assigns the burden of proof to the party arguing for the restraint's validity. See RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 6.1(2) illus. 1 (1983). And, in a case involving a bequest conditioned on the legatee's divorcing his current spouse, at least one court likewise assigned the burden of
tion of this public policy standard has led to a “welter of conflict and confusion” from which it is difficult to distill any consistent principles. The restraint imposed in the “will of hate” was declared invalid, yet the efforts of the equally uncharitable testator who conditioned his bounty on the legatee’s ceasing to support the legatee’s wife met with success.

This confusion as to result bespeaks confusion as to underlying theory. An individual who wishes her nephew to remain unmarried can, upon his marriage, revoke a will she had previously made in his favor, and the nephew will have no legal right to reinstate the bequest. One may disinherit family members for any reason at all, however arbitrary or even hateful the reason may be; unconditional testamentary dispositions are not subjected to any “reasonableness” standard. And a testator is permitted to stipulate in her will that a particular bequest is to be paid to her nephew only if he is unmarried at the date of her death. But if the testator’s will conditions her bounty to the nephew on the nephew’s remaining unmarried—even after her death—such a provision probably will be declared invalid on public policy grounds. Why are conditional bequests subjected to a reasonableness test while unconditional bequests

proof to the party seeking to uphold the condition. See In re Estate of Gerbing, 337 N.E.2d 29, 33 (Ill. 1975).


21. Throughout this article, I shall use the word “restraint” to refer to a testamentary condition or limitation calculated either to deter the legatee from engaging in or to encourage the legatee to engage in certain conduct. Strictly speaking, such conditions and limitations are not “restraints” at all, inasmuch as they do not impose any obligations on the legatee or impede her freedom of action. They do, however, constitute a check on the legatee’s conduct; “by holding out a threat of losing or a hope of gaining a pecuniary benefit.” 6 AMERICAN LAW OF PROPERTY § 27.1, at 592 (A. James Casner ed., 1952), they tend to influence the legatee to make choices that she might not otherwise make. Consequently, these conditions are often referred to as restraints, see, e.g., RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS §§ 5.1–8.3 (1983), even when they are intended to induce rather than restrain.

22. See supra text accompanying note 16.

23. See Knox v. Estate of Fredette, 392 A.2d 502, 503-04 (Conn. Super. Ct. 1978); see also supra text accompanying note 12. In Knox, the testator bequeathed a legal life estate to his wife, with the remainder to her son, Howard Knox. See Knox, 392 A.2d at 503. But if, by the date of distribution, John Knox, Howard’s brother, was no longer living with or supporting his wife, Patricia Gloria Litike Knox, then the remainder upon the death of the testator’s wife was to go to John and Howard in equal shares. See id. The testator’s wife predeceased the testator. See id. The court treated the condition as valid without discussion and focused only on whether John was or was not supporting his wife at the time of distribution. See id.

24. See Clapp v. Fullerton, 34 N.Y. 190, 197 (1866) (“The right of a testator to dispose of his estate, depends neither on the justice of his prejudices, nor on the soundness of his reasoning. He may do what he will with his own; and if there be no defect of testamentary capacity, and no undue influence or fraud, the law gives effect to his will, though its provisions are unreasonable and unjust.”); see also Soger v. Soger, 186 N.E.2d 288, 290 (Ill. 1962).

Nondispositive provisions, calling for the destruction of rather than the transfer of property, are rejected on public policy grounds. See, e.g., Eyerman v. Mercantile Trust Co., 524 S.W.2d 210, 215-17 (Mo. Ct. App. 1975).

are not? And why is the former condition (nephew must be unmarried at testator’s death) permissible, while the latter (nephew must remain unmarried even after testator’s death) is not?

The traditional explanation for striking down only the latter condition is that the restraint it imposes continues beyond the testator’s death and therefore exerts its influence when it is no longer amenable by appeal to the transferor’s reason and reflection upon changed circumstances. 26 I shall call this explanation the “continuing influence” rationale.

Suppose a man leaves money to his son in trust, the trust to fail however if the son does not marry a woman of the Jewish faith by the time he is 25 years old. The judicial approach in such cases is to refuse to enforce the condition if it is unreasonable. . . . [27] [By way of comparison, c]onsider . . . 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. But if he is dead, this kind of “recontracting” is impossible . . . . 28

Under this traditional analysis, a condition that purports to influence the legatee’s conjugal or religious choices after the testator’s death is subject to challenge on public policy grounds, but a similar condition that exerts no posthumous influence is perfectly acceptable. 29 For example, a testamentary condition requiring that the legatee eventually divorce his spouse might be invalidated on public policy grounds, 30 but a testamentary condition requiring that the legatee divorce his spouse before the testator’s death would be regarded universally as valid. In In re Estate of Clarke, 31 the testator made alternative bequests to her son Eugene W. Clarke; if he was still married to Clara Clarke on the date of the testator’s death, he would receive only $5,000; if he was divorced from Clara (or if she had predeceased him) by the date of the testator’s death, he would receive one-third of the residue of the testator’s estate.

26. [A] policy of fostering free family interaction or privacy between individuals, or simple tolerance of human frailty, traditionally exempts acts of property owners (and even their outright dispositions by will) from restrictions that would apply to personally intrusive or socially dubious conditions in the distributive provisions of [wills and] irrevocable trusts. Even the “rigor mortis” of dead hand control is not present while a property owner is able to respond to persuasion and evolving circumstances.


27. It would be more accurate to say that the judicial approach in such cases is to enforce the condition unless it is unreasonable. See Restatement (Second) of Property: Donative Transfers § 6.2 (1983).


31. 57 P.2d 5 (Colo. 1936).
The court upheld the conditions against a challenge that the conditions were contrary to public policy because they encouraged divorce:

It is a familiar and well-settled principle of law that a will speaks as of the time of death or as though it had been written immediately prior to death. . . . [A will] cannot contravene the public policy of the state, if it does, until it begins to speak. . . . After the death of the testatrix, the time at which the will began to speak, there was nothing that Eugene W. Clarke could do to increase or diminish the amount he would receive under the will. His portion was fixed absolutely as of the time of the death of the testatrix and his then status with respect to his wife, Clara. There was then no inducement for him to destroy the marriage status, for it could avail him nothing.\textsuperscript{32}

The problem with the “continuing influence” rationale for striking down certain testamentary conditions is that it proves too much, for every testamentary disposition restrains people’s use of property after the testator’s death has put him beyond the reach of argument and reflection. If a testator devises successive interests in Blackacre to $A$ and $B$, the arrangement is put equally beyond the reach of subsequent persuasion whether $B$’s interest is to take effect upon the expiration of a ten-year term in $A$ (valid) or upon $A$’s marriage (probably invalid). The objection that the “continuing influence” rationale makes to these testamentary restraints is no different from the broader objections to “dead-hand” control.\textsuperscript{33} If all that concerns us are the inequities of dead-hand control, there is no reason why the condition relating to marriage should be more objectionable than the ten-year term provision.

At the same time as the “continuing influence” rationale proves too much, it also proves too little. Suppose a testator’s will provides: “I devise Blackacre to $A$, if $A$ has killed $B$ before my death; but if $A$ has not killed $B$ before my death, then I devise Blackacre to $C$.” The condition attached to $A$’s devise offers no continuing inducement to commit homicide; after the testator’s death, it is too late for $A$ to satisfy the condition if she has not already satisfied it. Yet most assuredly the condition would be struck down on public policy grounds.\textsuperscript{34}

\textsuperscript{32} Id. at 8; accord \textit{In re} Estate of Gehrt, 480 N.E.2d 151, 152-53 (Ill. App. Ct. 1985); \textit{In re} Estate of Heller, 159 N.W.2d 82, 85 (Wis. 1968).

\textsuperscript{33} Among the best-known statements of the objection to “dead-hand” control is Lord Hobhouse’s: A clear, obvious, natural line is drawn for us between those persons and events which the [testator] knows and sees, and those which he cannot know or see. Within the former province we may trust his natural affections and his capacity of judgment to make better dispositions than any external Law is likely to make for him. Within the latter, natural affection does not extend, and the wisest judgment is constantly baffled by the course of events. \textit{Arthur Hobhouse, The Dead Hand} 188 (1880).

\textsuperscript{34} One court, at least, recognized this particular imperfection in the “continuing influence” rationale and suggested that even a condition that relates only to conduct performed during the testator’s life will be struck down if the conduct is itself illegal. \textit{See In re} Estate of Clarke, 57 P.2d 5 (Colo. 1936). In the \textit{Estate of Clarke} case, see supra text accompanying notes 31-32, the court upheld the validity of a testamentary provision that enlarged the testator’s son’s share of her estate if he was divorced from his wife.
The growing movement to abolish the Rule Against Perpetuities has sharpened the need to reexamine the law of testamentary conditions.\textsuperscript{35} Under the Rule, a noncharitable trust generally can last for no more than three generations, so a testator's impositions—whimsical or spiteful—rarely endure for more than about seventy-five years. But the prospect of a perpetual trust along such lines as "for such of my descendants as shall marry members of the Caucasian race and abjure the Jewish faith" raises the legal and moral stakes considerably.

The purpose of this article is to offer a new theory for responding to these testamentary restraints: a theory that, it is hoped, will not only yield more consistent and explainable results than the free-floating "public policy" analysis\textsuperscript{36} but also restrict the enforceability of these intrusive,\textsuperscript{37} divisive\textsuperscript{38} conditions even more than current law.\textsuperscript{39} Although the

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Clara (or if Clara had predeceased him) by the date of the testator's death. In upholding the condition on the ground that it offered no continuing inducement to divorce, the court noted that divorce was legal.

If the expression of an intention to dispose of property in the future takes into consideration a status of the beneficiary that may come about by natural means, or be lawfully brought about, we cannot say that one's bounty shall not be conditioned on such status existing at the time of death. \textit{Estate of Clark}, 57 P.2d at 8. Might not the condition in the \textit{Estate of Clarke} case be regarded as an inducement to commit murder like the condition in my \textit{A}, \textit{B}, and \textit{C} example—insomuch as the testator's son in the \textit{Estate of Clarke} case would have qualified for the larger bequest if his wife had predeceased him by the testator's death? That survivorship conditions are not regarded as inducements to murder is clear. \textit{See Baker v. Hickman}, 273 P. 480, 481 (Kan. 1929); \textit{In re Estate of Little}, 170 A.2d 106, 108 (Pa. 1961). But this is a point we shall discuss later. \textit{See infra} note 150.

The issue of a bequest conditioned on the legatee's committing a crime has intrigued commentators for decades. Although no cases directly on point have been found, commentators are confident that such conditions would be held void. \textit{See supra} note 21, n. 27, at 591, \S 27.17, at 659; \textsc{1A Scott on Trusts} \S 62.1, at 284 (William Franklin Fratcher ed., 4th ed. 1987). Certainly one could challenge such conditions by analogy to cases striking down testamentary conditions calculated to induce parents to neglect their duties to support their children, \textit{see, e.g., Zdanowich v. Sherwood}, 110 A.2d 290, 293 (Conn. Super. Ct. 1954), or calculated to induce a husband to neglect his duty to support his wife. \textit{See, e.g., Potter v. McAlpine}, 3 Dem. 108, 123-25 (N.Y. Sur. Ct. 1885).


36. \textit{Cf. Egerton v. Brownlow}, 10 Eng. Rep. 359, 387-88 (H.L. 1853) ("It seems to me extremely dangerous to limit the power of disposition on any general notion of impolicy, without some definite rule or principle being shown to apply to the case."). The case involved a bequest pursuant to which a legatee's male heirs, who otherwise would have received the property on the legatee's death, were to be divested if the legatee failed to become Duke or Marquis of Bridgewater by his death. The House of Lords, disagreeing with the conclusion of the judges whose opinions it sought, held the condition void on public policy grounds. \textit{See id.}

37. The will of Henry Budd, who died in 1862, contained this proviso:

In case my son Edward shall wear a mustache, then the devise hereinbefore contained in favor of him, his appointees, heirs and assigns of my said estate, called Pepper Park, shall be void; and I devise the same estate to my son William, his appointees, heirs and assigns. And in case my
diverse catalogue of relevant cases includes conditions relating to such matters as retention of a family name\textsuperscript{40} or the pursuit of a specified profession or education,\textsuperscript{41} this article will concentrate on restraints affecting legatees' conjugal or religious choices, inasmuch as those cases are the most numerous and the most distressing.

I. A Statement of the Theory

A. A Brief Summary

Testation is an anomaly.\textsuperscript{42} We don't let the dead vote;\textsuperscript{43} why do we let them tell us what to do with material resources?\textsuperscript{44}

son William shall wear a mustache, then the devise hereinbefore contained in favor of him, his appointees, heirs, assigns of my said estate called Twickenham Park, shall be void; and I devise the said estate to my son Edward, his appointees, heirs and assigns. And in case my son Edward . . .

ROBERT S. MENCHIN, WHERE THERE'S A WILL, 105 (1979).

More recently, a testator bequeathed a remainder interest in a trust to his son, provided the son “live[d] a sober, respectable life and that he exhibit[ed] a willingness to work diligently and to save a reasonable amount of his earnings.” Alexander v. Hicks, 488 S.W.2d 336, 337 (Ky. 1972).

38. In In re Devlin's Trust Estate, 130 A. 238 (Pa. 1925), a Catholic testator established a trust that was to pay income for the benefit of his grandson, Clarence, “only so long as he is brought up and reared in the Roman Catholic faith.” Id. at 239. Clarence was the son of the testator's Catholic son and a Protestant woman. When Clarence's father died, the condition was intended to constrain Clarence's mother to rear Clarence in the faith of his father and grandfather, rather than in her own faith. The condition was held invalid. See id.; see also supra text accompanying notes 19-23.

39. The Restatement (Third) of Trusts adopts a somewhat harsher view of these conditions than current law—that is, a view less deferential to the wishes of testators and more solicitous of legatees' autonomy—but it does not offer any general theory in support of this harsher view. Indeed, it cautions against the kind of project I have undertaken. “[S]imple and precise rules of validity or invalidity frequently cannot be stated. This is particularly so because of the need to weigh the often worthy concerns and objectives of [testators] against the objectionable effects or tendencies of conditions attached to beneficial interests.” RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. d (1998).

The Restatement's harsher view of these conditions is not expressly stated but is rather to be inferred from the examples it offers. For instance, illustration 5 in comment d involves a condition tending to encourage divorce, a condition that, given all the stated facts, likely would be enforceable under modern case law. See infra text accompanying note 153. The Restatement, however, recommends against enforcing the condition as is, though it would authorize and encourage the court, through application of a cuy pres power, to modify the condition rather than striking it down altogether. See infra note 244. As shall appear, the approach to be offered in this article would strike the condition altogether and would not engage in the “weigh[ing]” referred to in the Restatement comment. See infra notes 170-72 and accompanying text.


41. See, e.g., Ellicott v. Ellicott, 45 A. 183, 184 (Md. 1900); In re Jacobs' Will, 280 N.Y.S. 1, 2 (App. Div. 1935), modified, 199 N.E. 685, reargument denied, 1 N.E.2d 355 (N.Y. 1936); Webster v. Morris, 28 N.W. 353, 355 (Wis. 1886).

42. Throughout this article, the word “testation” refers to a property owner's effective designation, by will, of the persons who shall receive his property upon his death. The word “inheritance” refers to the distribution of a deceased property owner's assets to his heirs pursuant to the applicable intestacy statutes.

43. Stories exist, apocryphal or otherwise, about fraudulent votes cast in the names of dead people. See, e.g., SEYMOUR M. HERSCH, THE DARK SIDE OF CAMELOT 36 (1997); Ann Scales Cobbs & George
We could let decedents vote; no practical impediment precludes at least limited posthumous voting. We could, for example, allow for a testamentary ballot, whereby a testator could cast her vote for the party of her choice in each of the first, say, three presidential elections following her death.\(^45\) The ballot would be signed, attested, and, upon the testator's death, proved and enrolled just like any will; and posthumous votes would be duly cast by the executor and counted at the next three presidential elections.

The objection to posthumous voting, of course, is that thoughtful, reflective voting requires a knowledge of current circumstances—keeping abreast of changes and deliberating about the implications of those changes. For obvious reasons, a dead person cannot keep current, cannot deliberate, and therefore her posthumous votes never can reflect considered judgment or an understanding of likely outcomes.\(^46\) There is also the

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\item 44. Naturally speaking, the instant a man ceases to be, he ceases to have any dominion; else if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him: which would be highly absurd and inconvenient.
\item 2 BLACKSTONE, supra note 10, *10.
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\item 45. We would need to impose some limit on the duration of this testamentary franchise; otherwise, after a few generations, dead voters would outnumber the living.
\item 46. In 16th-century England, the succession to the Crown was not determined by an unalterable, established order of precedence. Rather, the Crown was somewhat at the disposal of the reigning monarch, in that he could, when authorized by Act of Parliament, designate his successors. King Henry VIII, in his will, directed that in the event all three of his children died childless, the succession was to pass to the issue of his younger sister, Mary, rather than to the issue of his elder sister, Margaret, as would have been more customary. See THE LIVES OF THE KINGS AND QUEENS OF ENGLAND 202 (Antonia Fraser ed., 1995). On this point, Henry's will was reconfirmed during the reign of his son and immediate successor, Edward VI. See CAROLLY ERICKSON, BLOODY MARY 284-85 (1978). Henry's preference for Mary's line may have been due to Margaret's Scottish marriages and to his reluctance to allow a Scot onto the English throne. See JASPER RIDLEY, HENRY VIII 48 (1985). All three of Henry's children did indeed die childless, and in accord with Henry's testamentary preference for Mary's line, Mary's granddaughter, Lady Jane Grey, became the luckless tool of an unsuccessful anti-Catholic insurgency that cost Jane her head. Thus, King Henry's will indirectly compassed the death of his own grandniece. But that was the only effect of his attempt to prescribe the
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moral hazard issue. A posthumous voter may be less reflective because she does not have to suffer the consequences of her vote if her preferred candidate wins.

All this is perfectly true, of course, but it is equally true of property-use decisions. Questions about the proper distribution and use of resources are best answered with reference to current facts and circumstances, a judgment that the dead cannot make.

The tendency of some testators to make rigid dispositions is often an aspect of an understandable type of vanity. T has been successful in business and this money is the measure of and witness to his success. He has been a good father and has always known what was best for his family. Who should know better than he how to invest and dispose of this money after his death? The only answer is: Time marches on. Thoughtless, playful children grow into serious-minded resourceful adults. Healthy, prosperous adults suffer illness, failure and the other casualties of life. The gilt-edge bonds of today are the cats-and-dogs of tomorrow. To regulate events in 1980 the judgment of a mediocre mind on the spot is incomparably preferable to the guess in 1960 of the greatest man who ever lived.48

future descent of the Crown among his collateral relations; notwithstanding Henry's will, none of Mary's descendants ever reigned, and every English monarch since 1603 (James I, Margaret's great-grandson) has been a descendant of Margaret. See THE LIVES OF THE KINGS AND QUEENS OF ENGLAND, supra, at 214-15, 260-61, 322-23.

47. Indeed, allowing the dead to dispose of resources is potentially more disturbing than allowing them to vote, inasmuch as a single testator, if wealthy or crafty enough, can have considerably more impact than a single voter.


One must be careful about inveighing too indiscriminately against the nescience of the dead and the folly of the living's submission to them. Are not the American Constitution and statutes likewise examples of dead-hand control? Americans are subject to the federal estate tax in 1999, although not one of the legislators who voted for the establishment of the estate tax, see Revenue Act of 1916, Pub. L. No. 71-371, ch. 463, §§ 200-212, 39 Stat. 756, 777-80 (codified as amended at I.R.C. §§ 2001-2209 (1994)), is alive any longer. The difference, of course, is that when the dead control us through "their" constitution and their statutes, they do so at the sufferance of the living, for the living can amend the work of their predecessors if they wish. The American law of wills, on the other hand, ordinarily treats testamentary instructions as unalterable commands, to be followed to the letter however unreasonable they may be. See supra note 24.

English law, it is worth noting, is much more flexible than American law in permitting judges to override dispositive testamentary instructions at the behest of the living. In Saunders v. Vautier, 49 Eng. Rep. 282 (1841), for example, a testator had bequeathed stock in trust, the income to be accumulated until the beneficiary reached the age of 25, at which time the principal and all the accumulated income were to be distributed to him. When the beneficiary reached the age of 21, he successfully petitioned the court to terminate the trust "prematurely" and order the immediate distribution to him of the principal and accumulated income. Although the testator had prescribed a more protracted distribution schedule, the court granted the petition because the petitioner was the sole beneficiary of the trust—i.e., the sole interested party—and was now old enough to give the trustee a valid discharge. See id. at 282; see also In re Jacob's Will, 54 Eng. Rep. 683, 684 (1861).

The American view, on the contrary, is that the beneficiaries are not the only interested parties; the deceased settlor is an interested party, too. In the leading case of Claflin v. Claflin, 20 N.E. 454 (Mass. 1889), a testator had left property in trust for a beneficiary, with directions that the trustee was to pay the beneficiary $10,000 when he attained the age of 21, $10,000 at 25, and the balance at age 30. After the beneficiary reached 21 (and received the first installment) but before he reached 25, he brought
The moral hazard objection is also as applicable to testation as to posthumous voting.

Making a will is an exercise of power without responsibility. Free of the constraint of what the neighbours would think; free, above all, of the constraint of requiring houses and assets for their own use, testators can sometimes be so awed by the infinite wisdom of their own plans for the future as to feel justified in controlling other people’s lives— for their own good, naturally.\(^\text{49}\)

If the objections to testation are no less powerful than the objections to posthumous voting, why do we allow testation? The answer I propose is that allowing testation is objectionable, but the consequences of disallowing testation would be still more objectionable.\(^\text{50}\) We allow testation because not to allow it would be harmful. But we should allow it only to the extent necessary to prevent those particular harms. Allowing property owners to determine who will enjoy their wealth after their deaths is necessary to avoid the harms, but allowing them to use their wealth to “contro[l] other people’s lives”\(^\text{51}\) is not necessary. Consequently, testamentary restraints on legatees’ conjugal and religious choices are per se undesirable; society’s aid should not be enlisted to enforce such restraints, even if the restraints can pass some sort of “reasonableness” test.\(^\text{52}\)
I shall call this hypothesis the “minimalist testation” theory. Let us turn now to a more detailed exposition of it.

B. Testation Is Not a Constitutional Right

We tend to regard the right to bequeath as a natural product of a private property regime and assume that a society that protects private property must necessarily allow the property owner to designate her successors upon her death. In fact, however, the ancient Greeks of Athens’s “Golden Age” managed quite well without free testation, and in England, in part because of the demands of feudalism, it was not until the enactment of the Statute of Wills in 1540 that the owner of a freehold in land was empowered to devise it.

Nonetheless, it is undoubtedly true that the Anglo-American understanding of testation grew out of a natural rights account. To Locke, children’s right to inherit from their parents derived from the natural imperatives of procreation and familial preservation:

God Planted in Men a strong desire . . . of propagating their Kind, and continuing themselves in their Posterity, and this gives Children a Title, to share in the Property of their Parents, and a Right to Inherit their Possessions. Men are not Proprietors of what they have meerly for themselves, their Children have a Title to part of it, and have their Kind of Right join’d with their Parents, in the Possession which comes to be wholly theirs, when death having put an end to their Parents use of it, hath taken them from their Possessions, and this we call Inheritance. Men being by a like Obligation bound to preserve what they have begotten, as to preserve them-

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Waldron, 152 A. 69, 70-71 (Conn. 1930); Herron v. Stanton, 147 N.E. 305, 308 (Ind. Ct. App. 1922); City of Belfast v. Goodwill Farm, 103 A.2d 517, 522 (Me. 1954). The Uniform Statutory Rule Against Perpetuities contains a provision to the same effect—an exception for any “nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interested is preceded by an interest held by another charity, government, or governmental agency or subdivision.” UNIF. STATUTORY RULE AGAINST PERPETUITIES § 4(5), 8B U.L.A. 370 (1993).

In view of the greater leeway allowed the settlers of charitable trusts, this article will explore the problem of testamentary conditions only in the context of noncharitable transfers.


54. 32 Hen. 8, ch. 1 (Eng.).

55. See Paul G. Haskell, Justifying the Principle of Distributive Deviation in the Law of Trusts, 18 HASTINGS L.J. 267, 268 (1967). Before 1540, freeholders, disabled from devising their land, had found a way around that disability by employing the device of feoffments to use; that is, until the 1535 Statute of Uses, 27 Hen. 8, ch. 10 (Eng.), effectively barred that device. See THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 14 (2d ed. 1953).

Legacies of personality, beneath the horizon of the common-law courts, came by default under the jurisdiction of the ecclesiastical courts, which, with the example of Roman law before them, permitted wills of personality and applied Roman law to them. See Joseph Dainow, Limitations on Testamentary Freedom in England, 25 CORNELL L.Q. 337, 340 (1940). At about the middle of the 13th century, this jurisdiction over legacies was vested exclusively in the ecclesiastical courts, though it came to be shared by the Court of Chancery. See Olin Browder, Jr., Conditions and Limitations in Restraint of Marriage, 39 Mich. L. Rev. 1288, 1290-91 (1941).
selves, their issue come to have a Right in the Goods they are pos-

sessed of.\footnote{56} Locke was referring here not to a right of free testation, whereby a property owner could choose the objects of his posthumous bounty, but rather to something closer to intestate succession: a right to have his property pass to his children upon his death. In his Second Treatise of Government, however, Locke seemed to recognize at least a limited right of testation flowing naturally from the nature of filial duty. A father may divide his property among his children "with a more sparing or liberal hand, according as the Behaviour of this or that Child hath comported with his Will and Humour."\footnote{57}

Thomas Jefferson took this notion even further and gave it a consequentialist spin. In his preamble to the Virginia legislation of October 14, 1776, abolishing entails, Jefferson noted the difficulties that would ensue if children were assured of inheriting their parents' wealth: "[T]he perpetuation of property in certain families by means of gifts made to them in fee-tail is contrary to good policy, . . . and sometimes does injury to the morals of youth by rendering them independent of, and disobedient to, their parents . . . ."\footnote{58}

Modern commentators who view inheritance as a natural right include free testation within the protected category of rights. Professor Epstein, for example, regards the right of free testation as by nature inseparable from the concept of property ownership.\footnote{59} This natural rights

\footnote{56} John Locke, Two Treatises of Government 224 (Peter Laslett ed., 1960).

In the Hebrew Bible, the right to inherit is assumed. It is, for example, "strongly defended by the prophet Elijah when King Ahab, by falsely accusing a man named Naboth of capital crimes, tries to deprive him of the right to pass on to his heirs the vineyard he has received from his father (1 Kings 21:1-19; cf. Micah 2:1-5)." Stephen Sapp, Religious Views on Legacy and Intergenerational Transfers, Generations, Fall 1996, at 31, 32.

\footnote{57} Locke, supra note 56, at 333.

\footnote{58} Thomas Jefferson, Bill to Enable Tenants in Fee Tail to Convey Their Lands in Fee Simple, in 1 The Papers of Thomas Jefferson 560 (J. Boyd ed., 1950). Thirteen years later, Jefferson was to take a more contentious view of inheritance, denying that it was a natural right. See Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 2 The Papers of Thomas Jefferson, supra, at 392 ("The earth belongs in usufruct to the living; the dead have neither powers nor rights over it."). It has been suggested that Jefferson's later views of inheritance may have been shaped by the pressure of debts he had inherited from a relative. See Cullen Murphy, On One Condition: When the Past Makes the Present Jump Through Hoops, Atlantic Monthly, Apr. 1994, at 24, 26. For example, Jefferson writes in his letter to Madison: [N]o man can, by natural right, oblige the lands he occupied, or the persons who succeed him in that occupation, to the [payment] of debts contracted by him. For if he could, he might, during his own life, eat up the usufruct of the lands for several generations to come, and then the lands would belong to the dead, and not to the living, which would be the reverse of our principle. Letter from Thomas Jefferson to James Madison, supra, at 393.


There is no principled distinction between the right of property and the right of succession. The conception of property includes the exclusive rights of possession, use, and disposition. The right of disposition includes dispositions during life, by gift or by sale, and it includes dispositions at death, which are limited only by the status claims of family members protected, for example, by rules relating to dower and forced shares.

Id. This argument is "associated with neo-libertarianism." Adam J. Hirsch & William K.S. Wang, A Qualitative Theory of the Dead Hand, 68 Ind. L.J. 1, 3 (1992).
approach occasionally surfaced in American case law, most notably in *Nunnemacher v. State*, where the Supreme Court of Wisconsin, although upholding the constitutionality of that state’s first inheritance tax, nonetheless averred that the right to bequeath was one of those inherent, inalienable rights mentioned in the Declaration of Independence, a natural right that existed before the social compact giving rise to civil government.\(^{61}\)

In general, however, the positivist view of inheritance has triumphed in our legal tradition. Blackstone observed:

> We are apt to conceive at first view that [inheritance] has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no *natural*, but merely a *civil* right.

\(\ldots\)

> Wills, therefore, and testaments, rights of inheritance and successions are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them.\(^{62}\)

If our rule of inheritance were derived from natural law, argued Blackstone, the rule would require not the descent of a decedent’s property to the decedent’s offspring or nominees but rather the reversion of such property to a natural state, where it would become available to the first person who could thereafter occupy and secure it. “But any such process would, in [Blackstone’s] view, lead to enormous discord in a perpetual rush to lay claim to the properties of the recently deceased, and it was therefore ‘for the sake of civil peace’ that society began to order inheritance [both testate and intestate] by legislation.”\(^{63}\)

Perhaps the clearest and most authoritative statement of this positivist account of testation is a U.S. Supreme Court holding that a New York statute granting a surviving spouse the right to renounce the decedent spouse’s will and claim her intestate share did not violate the contracts clause of the federal Constitution:

> Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand

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60. 108 N.W. 627 (Wis. 1906).
61. See id. at 628. Interestingly, the passage quoted from the work of Professor Epstein, see *supra* note 59, was a critique of *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283 (1898), a case upholding the constitutionality of state progressive inheritance taxes.
When Sir William Harcourt introduced “death duties” in Parliament in 1894, he said:
Nature gives a man no power over his earthly goods beyond the term of his life; what power he possesses to prolong his will beyond his life—the right of a dead hand to dispose of property—is a pure creation of the law, and the State has the right to prescribe the conditions and the limitations under which that power shall be exercised.
1 ELY, *supra* note 44, at 416 (quoting Harcourt).
rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition or even abolish the power of testamentary disposition over property within its jurisdiction.\(^64\)

The Supreme Court may have retreated somewhat from this positivist view in the recent, troubling case of *Hodel v. Irving*.\(^65\) To reverse the increasing division of tribal lands into small, uneconomic, undivided fractional interests (a trend that resulted from a misguided nineteenth-century legislative policy), Congress enacted the Indian Land Consolidation Act of 1983.\(^66\) The Act provided that any such undivided interests, if under a certain size and value at the owner's death, would escheat to the tribe rather than passing to the owner's heirs or under his will.\(^67\) The Supreme Court held that the Act's abrogation of the power to bequeath such interests amounted to a "taking" of property and that, because the Act provided no compensation for such a taking as required by the Fifth Amendment, the Act was unconstitutional.\(^68\)

Although the case might be read as a departure from American law's traditional positivist view and as an assertion of a constitutional right to bequeath,\(^69\) considerable doubt exists as to the case's reach and reasoning.\(^70\) There was no direct discussion of why the right to bequeath is a constitutionally protected right, and even if such a constitutionally protected right does exist, nothing in the *Irving* opinion warrants the conclusion that the right includes the freedom to impose testamentary restraints on transferees' conduct or, indeed, anything beyond the bare

\(^64\) Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942); see also Magoun, 170 U.S. at 288 ("The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it."); Eyre v. Jakob, 55 Va. 422, 430 (1888) ("The legislature may to-morrow, if it pleases, absolutely repeal the statute of wills and that of descents and distributions and declare that upon the death of a party, his property shall be applied to the payment of his debts, and the residue appropriated to public uses.").


\(^67\) See id. § 207, 96 Stat. at 2515; see also Hodel, 481 U.S. at 709.

\(^68\) See Hodel, 481 U.S. at 717-18. The Act's perceived constitutional defects were not remedied by a 1984 amendment permitting the devise of an otherwise escheatable fractional interest to any other person holding an undivided fractional interest in the same parcel. See Babbitt v. Youpee, 519 U.S. 234, 241 (1997).

\(^69\) The Court's opinion focused on a decedent's right to specify his successors, rather than on the successors' right to inherit from the decedent, suggesting that the government had the power, without implicating the " takings" clause, to abolish intestate succession altogether, as long as there remained in the property owner a power "to formally designate an heir." *Hodel*, 481 U.S. at 718. It is curious that the Court regarded the right to bequeath as more "fundamental" than the right to inherit, for the right to inherit is of more ancient origin. See *supra* text accompanying notes 53-55. In other circumstances, the Court, however disingenuously, regards a right's "age" as an indicium of its prominence. See, e.g., Washington v. Glucksberg, 521 U.S. 702, 728 (1997) (denying a right to assisted suicide); Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (upholding Georgia's anti-sodomy statute).

\(^70\) For a comprehensive discussion of *Hodel v. Irving* and its implications, see Ronald Chester, *Is the Right to Devise Property Constitutionally Protected?—The Strange Case of Hodel v. Irving*, 24 SW. U. L. REV. 1195, 1208-09 (1995) (arguing that the Court grants constitutional protection to a testamentary right only in those rare instances where the very nature of the asset precludes inter vivos disposition).
power to name successors in a will. In fact, the Court indicated that
the right to bequeath is not absolute, for it stated that the federal
government could properly bar a property owner from "further subdividing" his
interest by will.

A natural rights or libertarian analyst of testation might reject any
distinction between the right to bequeath and the right to make condi-
tional bequests. Professor Epstein puts the argument syllogistically: "If I
needn’t convey at all, then I can convey subject to whatever restrictions I
choose." On its face, this syllogism seems like an unremarkable corol-
larly of the principle that the greater power includes the lesser. But as a
defense of a constitutional right to impose testamentary restraints, the
syllgism is less satisfactory, as a glance at the doctrine of unconsti-
tutional conditions may suggest. It has often been held as a matter of con-
stitutional law that although the government may constitutionally with-
hold a certain benefit completely, it may not constitutionally condition
that benefit on the recipient's foregoing "an activity that a preferred con-
istutional right normally protects from government interference." Thus, a
power to refuse to perform an act altogether does not necessarily
include the power to perform the act conditionally. Professor Epstein's
syllgism is flawed even in a private law context, for his premise, "if I
needn’t convey at all," is quite inapposite to testamentary transfers. Al-
though a property owner has the option of not transferring his property
inter vivos, he does not have the option of not transferring it at death. If
he deliberately fails to write a will, he thereby effects a transfer to his
heirs by means of the intestacy laws, and intestate transfers are invariably
unconditional.

It thus appears that we can approach the question of testation— cer-
tainly the question of testamentary conditions—as a purely normative
one without concerning ourselves with any constitutional objections to
restricting testation.

71. The Court employed only such bare bones phrases as "the right to pass on property—to one's
72. Id. at 718.
73. Richard A. Epstein, Past and Future: The Temporal Dimension in the Law of Property, 64
74. For example, a settlor's expressly retained power to revoke a trust includes the power merely to
modify the trust. See 4 SCOTT ON TRUSTS, supra note 34, § 331.1.
75. Kathleen M. Sullivan, Unconstitutional Conditions, 102 HARV. L. REV. 1415, 1489 (1989); see,
e.g., Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 146 (1987) (holding that a state's denial of
unemployment compensation benefits to a woman who was discharged for refusing to work on the Sab-
bath (Saturday) unconstitutionally burdened freedom of religion); Goldberg v. Kelly, 397 U.S. 254, 268
(1970) (finding that a state may not withdraw welfare benefits without providing for some sort of preter-
mination hearing); Pickering v. Board of Educ., 391 U.S. 563, 574 (1968) (holding that a public school
board's discharge of a teacher on account of his public criticism of the board unconstitutionally burdened
freedom of speech). The doctrine has not been applied unwaveringly, however. See, e.g., Wyman v.
James, 400 U.S. 309, 326 (1971) (holding that a state that conditioned payments under its Aid to Families
with Dependent Children (AFDC) program on the "recipient's submission to warrantless searches of her
home" did not unconstitutionally burden Fourth Amendment freedoms.)
C. The Case Against Testament

Criticisms of inheritance and testament often proceed from concerns about large, unequal accumulations of wealth,\textsuperscript{76} from an "ethical or aesthetic judgment that the prevailing distribution of wealth ... reveals a degree (and/or kind) of inequality which is distinctly evil or unlovely."\textsuperscript{77} The distribution of household wealth in America is far from even. One to two percent of American families own from twenty to thirty percent of the country's family wealth; the top twenty percent of American families own 400 times as much wealth as the bottom twenty percent.\textsuperscript{78} Moreover, most of this aggregate household wealth is derived from inheritance, not from participation in the labor force.\textsuperscript{79} Are we committed to accepting these disparities because we are committed to private property?

Perhaps the most frequently adduced of the contemporary justifications for private property is the efficiency argument. An individual will put resources to better use if he knows that the resources are his. "[P]rivate ownership of land ... [permits] an owner, by virtue of his power to exclude others, [generally to realize] the rewards associated with husbanding the [resources] and increasing the [productivity] of his land."\textsuperscript{80} If a resource is communally owned, the costs of taking precautions to maintain the resource are higher than the benefit to be gained by any one individual using the asset. As a result, no one takes precautions, and the resource is exhausted. This effect is known as the "tragedy of the commons."\textsuperscript{81} A private property regime, however, by according a private individual the exclusive right to the benefits derivable from the resource, "creates an incentive to use the resource efficiently. Once the resource in question is in private hands[,] the market then takes over to generate the most efficient allocation."\textsuperscript{82} For example, suppose Farmer A owns a par-

\textsuperscript{77} Henry C. Simons, Personal Income Taxation 18-19 (1938).
\textsuperscript{78} See Haslett, supra note 76, at 123-24.
\textsuperscript{79} See id. at 125-26.
\textsuperscript{80} This vast inequality in the distribution of wealth is (according to the best estimates) due at least as much to inheritance as to any other factor .... One estimate, based upon a series of articles appearing in Fortune magazine, is that 50 percent of the large fortunes in the United States were derived basically from inheritance. But by far the most careful and thorough study of this matter to date ... shows that ... a more accurate estimate of the amount contributed by inheritance to the wealth of "ultra-rich" males is 67 percent.
\textsuperscript{id} Some scholars believe the figure may be closer to 80%. See Carole Shammas et al., Inheritance in America From Colonial Times to the Present 3 (1987) (citing Laurence J. Kotlikoff & Lawrence H. Summers, The Role of Intergenerational Transfers in Aggregate Capital Accumulation, 89 J. Pol. Econ. 706 (1981)). But see The Forbes 400 by the Numbers, Forbes, Oct. 11, 1999, at 10 ("[Only] 149 members [approximately 37.5%] of The Forbes 400 [wealthiest living Americans] inherited some or all of their wealth.").
\textsuperscript{82} Garrett Hardin, The Tragedy of the Commons, 162 Science 1243 (1968).
\textsuperscript{83} Sarah Harding, Justifying Repatriation of Native American Cultural Property, 72 Ind. L.J. 723, 744 (1997). Judge Posner illustrates the importance of property rights as follows:
cel of land, and his farming skills permit him to derive $100 (in excess of labor and costs) per year from that parcel. Suppose Farmer B’s farming skills would permit her to derive $150 per year from that same parcel. If the present value of Farmer A’s income stream is $2,000 and the present value of the income stream Farmer B could derive if she owned the parcel is $3,000, Farmer A would be willing to sell the parcel and Farmer B would be willing to buy the parcel at any price between $2,000 and $3,000 (if we ignore transaction and information costs). If Farmer B buys the land for $2,500, Farmer A receives $500 more than the land is worth to him, and Farmer B pays $500 less than the land is worth to her. As a result of this sale from A to B, total farm productivity has increased by $50 per year.83

But great disparities of wealth can undermine the very utility that a private property regime is supposed to foster. Professor Coase’s famous theorem—that no matter how rights to resources are assigned initially, the resources will end up ultimately in their best use—presupposes not only a world of no transaction costs but also a world of no “wealth effects.”84 Suppose a rich man and a poor man vie for the same coat. The poor man would derive a hundred utils from the coat; it would keep him warm. The rich man would derive only ten utils from the coat; it would

Imagine a society in which all property rights have been abolished. A farmer plants corn, fertilizes it, and erects scarecrows, but when the corn is ripe his neighbor reaps it and takes it away for his own use. The farmer has no legal remedy against his neighbor’s conduct since he owns neither the land that he sowed nor the crop. Unless defense measures are feasible (and let us assume for the moment that they are not), after a few such incidents the cultivation of land will be abandoned and society will shift to methods of subsistence (such as hunting) that involve less preparatory investment.

POSNER, supra note 28, § 3.1, at 32. The efficiency argument for private property is not unlike the medieval Christian justification:

When men were innocent there was no need for private property, or the other great conventional institutions of society; but as this innocence passed away, they found themselves compelled to organize society and to devise institutions which should regulate the ownership and use of the good things which men had once held in common. The institution of property thus represents both the fall of man from his primitive innocence, the greed and avarice which refused to recognize the common ownership of things, and also the method by which the blind greed of human nature may be controlled and regulated. It is this ambiguous origin of the institution which explains how the Fathers [of the Church, such as Saints Ambrose and Augustine] could hold that private property was not natural, that it grew out of men’s sinful and vicious desires, and at the same time that it was a legitimate institution. For it must be clearly understood that they do maintain this.


83. See POSNER, supra note 28, § 3.1, at 33-34. Traditional economic theory maintains that because people know their interests better than courts or legislatures do, allowing people to transfer their assets freely conduces to efficient economic outcomes. Yet even Judge Posner acknowledges that when it comes to testation, untrammeled freedom of alienability may not necessarily maximize efficiency: “[M]aybe the explanation is . . . that many of these grants are once-in-a-lifetime transactions for the grantor, and he may not have good information about the problems they create.” Id. at 76. Later in the same work, Judge Posner notes that “if conditions, especially perpetual conditions, in a will are always obeyed, a frequent result would be that resources controlled by such conditions would be employed inefficiently.” Id. at 508.

allow him to wipe his shoe. But because the rich man can afford to pay $1,000 for the coat while the poor man can pay only $10, the coat ends up in the hands of the rich man, who derives less utility from it. The cumulative perpetuation of these wealth disparities over many generations multiplies the wealth effects and therefore impedes the efficient use of resources.

The accumulation of large family fortunes leads not only to unequal access to material and social goods but also to unequal access to power. Wealth brings, in addition to independence, an opportunity to impose one’s will on others, if only because others will want to share in that wealth and will seek to deal with the wealthy person. The English reformer L.T. Hobhouse drew a distinction between property held for “use” and property held for “power”:

In a developed society a man’s property is not merely something which he controls and enjoys, which he can make the basis of his labour and the scene of his ordered activities, but something whereby he can control another man and make it the basis of that man’s labour and the scene of activities ordered by himself.

... Now these two functions of property, the control of things, which gives freedom and security, and the control of persons through things, which gives power to the owner, are very different.

That power is distributed unequally is not necessarily regrettable, at least where power is distributed according to the degree with which one has been successfully educated in the Aristotelian virtues of Prudence, Temperance, and Justice. But when power is distributed in accordance with wealth, there is cause for concern, inasmuch as one’s wealth may re-
sult not from virtue but from factors reflecting variable moral content, such as boldness, cunning, and just plain luck.  

But even if wide disparities in family wealth are undesirable, from either an efficiency or a moral standpoint, the disparities do not necessarily argue for the abolition of inheritance or for restrictions on testation; in many cases, inheritance and testation preserve families' precarious economic positions. What these disparities argue for is some type of wealth redistribution, and a wealth transfer tax is a much more flexible instrument for preventing unwholesome accumulations of family wealth than are direct restrictions on the power of testation. To find sound reasons for criticizing testation, we must look elsewhere.

The strongest arguments against testation are the arguments to which I have already referred: allowing testation anomalously grants rights to the dead, and allowing such rights begets serious moral hazard problems. Any account of justice that rests on the maximization of overall utility, if it counts the desires of the dead along with those of the living, goes "badly awry," not simply because the dead always will outnumber the living, but also because actions presently taken make no difference in the experienced quality of a dead person's existence.

91. [1] It is an open empirical question whether it promotes utility or efficiency to award property rights when favorable entrepreneurial results come from hunches or sheer luck — or even, perhaps, from market boldness. In fact, it is unclear how much entrepreneurial success comes from business shrewdness or even market boldness. If a great deal of it comes from hunches or sheer luck, or from adventitious factors such as government subsidies or favorable regulation or insider information, then entrepreneurial risk-taking is morally less impressive than might at first appear.  
92. Id.; see also Charles Davenport, The Morality, Amorality, and Immorality of Taxation, 79 Tax Notes 261, 261-62 (1998) ("Wealth seems to flow from luck, luck, and luck, ancestors, talent, work, randomness, tenacity (stubbornness, if you want a less favorable term), and political institutions and economic conditions especially favorable to some specific inclinations and personalities.").  
94. See supra text accompanying notes 42-49.


94. See Derek Parfit, Reasons and Persons 152 (1984). Aristotle was unwilling categorically to disregard the desires of the dead, but he was inclined at least to discount them.

That the fortunes of descendants and of all a man's friends should not affect his happiness at all seems a very unfriendly doctrine, and one opposed to the opinions men hold; but since the events that happen are numerous and admit of all sorts of difference, and some come more near to us and others less so, it seems a long — indeed an endless — task to discuss each in detail; a general outline will perhaps suffice. If, then, as some of a man's own misadventures have a certain weight and influence on life while others are, as it were, lighter, so too there are differences among the misadventures of all our friends, and it makes a difference whether the various sufferings befall the living or the dead . . . , this difference also must be taken into account; or rather, perhaps, the fact that doubt is felt whether the dead share in any good or evil. For it seems, from these considerations, that even if anything whether good or evil penetrates to them, it must be something weak and negligible, either in itself or for them, or if not, at least it must be such in degree and
If we cede to the dead the power to tell the living what to do with material resources (that is, if we grant the right of testation), we encounter the obvious moral hazard problems that arise whenever an actor knows that she will suffer no consequences from her actions. The McCaig litigation provides a useful illustration of this effect. Catherine McCaig sought to impose on her testamentary trustees a duty to apply the income of her estate to the creation of a private enclosure and the erection within it of bronze statues of her parents and their nine children, the statues to cost at least £1000 apiece. In a legal challenge to the validity of that bequest, the trustees were relieved of their obligation to apply the income for that purpose, with the court noting the extreme wastefulness of the testator’s project:

I think . . . that it would be a dangerous thing to support a bequest of this kind which can only gratify the vanity of testators, who have no claim to be immortalised, but who possess the means by which they can provide for more substantial monuments to themselves than many that are erected to famous persons by public subscription.

The court further remarked that Catherine McCaig would have been perfectly free to spend her money on the statues while she was still alive, but it observed mordantly that she did not feel so strongly about the statues as to allow their construction to cramp her lifestyle:

The actings of the two M’Caigs[98] form an excellent illustration of this principle of human conduct. For many years they had apparently contemplated the erection of similar statues, but they could not bring themselves to part with the money during their own lifetimes. Such considerations do not restrain extravagance or eccentricity in testamentary dispositions, on which there is no check except by the Courts of law.[99]

95. See supra text accompanying note 49.
96. See McCaig’s Trustees v. Kirk-Sessions of the United Free Church, 1915 Sess. Cas. 426 (Scot. 2d Div.).
97. Id. at 434.
98. The testator’s deceased brother had tried unsuccessfully to make a similar endowment for posthumous statuary. See McCaig v. University of Glasgow, 1907 Sess. Cas. 231, 232 (Scot.).
A more contemporary American correspondent sees the moral hazard not as a problem but as an opportunity for smug flippancy:

'Want to amend your will without incurring the trouble and expense of rewriting the whole thing? Just add a codicil making the changes you want. The only disadvantage: hurt feelings, because your heirs will know what you did, and when. But hey, that won't be your problem.' 100

D. The Case for Testation

If testation occasions such problems, why is testation a good institution? The argument most frequently adduced in its favor, like the most common argument against it, 101 is an economic one. Without inheritance and testation, we would have too little saving; if we abolished inheritance and testation, say through a confiscatory estate tax, we would reduce people's incentive to save and would increase their incentive to consume, thereby reducing the amount of investment capital and diminishing our standard of living. 102 Let us see why this economic argument for testation, like the economic argument against it, is unsatisfying.

It is not at all clear that investment is more virtuous or better for the economy than consumption. Japan's current economic woes, for example, have often been traced to its people's underconsumption. 103 But let us assume, arguendo, that any reductions in the current level of American saving and investment would harm our economy.

It is said that if inheritance and testation were abolished, "everyone would plan to be dead broke on the day of [his] death." 104 Undoubtedly that would be true of some people, but how would they contrive to die broke? A retired individual who, on the basis of what proved to be an underestimate of her remaining life expectancy, decided how much of her wealth to expend each year would find her wealth running out before she died. The solution to the problem of unexpected longevity is to purchase annuities, and no doubt the abolition of inheritance and testation would drive some people into the annuity market. 105 But why would that

101. See supra text accompanying notes 76-91.
102. See infra note 104 and accompanying text.
103. As an article in The Wall Street Journal noted:
Today, the average Japanese family puts away more than 13% of its income, the average American family 4%. Yet Japan is in the tank while the U.S. prospers.

... [T]hese days, [Japan is experiencing a] pressing savings crisis ... Interest rates on bank deposits run below 1%, and still "households are saving too much," says Kengo Inoue, a Bank of Japan economist. "That's depressing demand and, over time, corporate investment." That, in turn, has become a drag on all of Asia.

105. In the absence of bequest motives, life cycle savers should always take advantage of opportunities to purchase annuities, as long as marginal annuities pay a rate of return in excess of that received.
decrease overall investment? A stampede into the annuity market would put more money into the hands of the insurance companies that issue annuity contracts, and the insurance companies have to do something with all that additional cash.  

In fact, however, it is unlikely that the abolition of inheritance and testation would impel property owners to invest all their wealth in annuities. First, even under a system without inheritance, people would not be inclined to annuitize their wealth until they approached age sixty or sixty-five; for those who died before that age, their wealth would continue to be held in conventional form. Second, there would still be a fair amount of precautionary saving. Because one year's expenses might, in cases of emergency, exceed the annual annuity payment, prudent property owners would keep a significant portion of their wealth within their own control and outside the hands of the annuity issuers. Third, the prospect of conferring one's wealth on one's successors may not be the most important reason for accumulating wealth. By making inter vivos gifts rather than waiting until death to transfer wealth, a property owner can reduce her total federal transfer tax bill and thus leave her beneficiaries with a larger balance.  

Even though wealthy people could transfer much more to their beneficiaries by using lifetime gifts than they can by waiting until death, it is clear that people make remarkably little use of the tax savings provided by gifts. It would appear that making lifetime sac-

on conventional assets. In contrast, people who care about their bequests must weigh higher survival-contingent returns against a reduced estate and will usually convert less than 100 percent of their assets into annuities, even if annuities are available at actuarially fair rates.  


Doctor Bernheim is not quite correct when he limits prudent annuity buying to situations in which annuities pay a higher return than conventional assets. Even if the annuity does not pay a higher rate than conventional assets, an annuity purchase is still economically sound if the purchaser is unable to sustain the risk of longevity. Suppose Smith is 70 years old and has accumulated $1 million to invest. If he uses it to buy a single life annuity from an issuer offering a six percent return (ignoring commissions, etc.), the company can pay Smith $121,558 per year for as long as Smith lives. If, instead, Smith invests his $1 million in a bank account paying six percent (after taxes) and withdraws $121,558 at the end of each year, his nest egg will run out before he reaches the age of 80. Inasmuch as the remaining life expectancy of a 70-year-old man is 13.3 years (i.e., he would be expected to live to the age of 83.3), Smith may be unwilling to undertake the risk that he will outlive his money.  

Why does the $1 million last longer in the hands of the annuity company than in the bank? In the case of the annuity, some of the 70-year-olds who buy annuities may die at 71 or 72 or 73; the remaining portion of their payments to the annuity company will be retained by the company and invested at six percent for the benefit of the other longer-lived annuity holders.  

106. Although insurance companies may—indeed must—invest their funds, state statutes customarily impose rigid constraints on the type of investments the companies may make, either limiting, for example, the percentage of their assets they may invest in real estate or restricting the classes of stocks they may purchase. See 1 COUCH ON INSURANCE § 2.30 (Lee R. Russ & Thomas F. Segalla eds., 3d ed. 1997). It must be admitted, therefore, that a shift in funds from private individuals to insurance companies would, absent a change in state law, remove from the potential investment pool dollars that might be invested in the kind of high-risk venture capital undertakings often regarded as essential for economic growth and job creation.  

rifices to increase the inheritance of one’s heirs is not very important in estate planning. 108

In other words, property owners, however benevolently disposed they may be toward their progeny, have grave concerns about their own continued comfort and independence and about the maintenance of their socio-economic stations. 109 The absence of testation rights might affect investment choices but would not be the determining factor. 110

It might also be urged that the abolition of inheritance and testation would undermine the private property regime inasmuch as confiscation at death would invariably enrich governmental coffers and lead, after several generations, to government ownership of all material resources. It is true that scholars and commentators who have tried to fashion a program for abolishing inheritance and testation have relied on some form of governmental confiscation as the means of achieving that result, 111 but governmental confiscation is not the only conceivable ap-

108. Gerard M. Brannon, Death Taxes in a Structure of Progressive Taxes, 26 NAT’L TAX J. 451, 452 (1973) (citing several studies and the cautionary example of Shakespeare’s King Lear). The tax advantages of making inter vivos gifts were even greater when these studies were undertaken than the advantages are now. See Sherman, supra note 107, at 120-21.

109. “Persons accumulate to gratify their egos, to gain prestige, to gain power—and simply out of habit. Once these impulses are taken into account, the economic contributions traceable to freedom of testation could turn out to be small.” Hirsch & Wang, supra note 59, at 8-9; see also supra text accompanying notes 96-99 (discussing the McCaig case).

110. Another point to keep in mind is that most corporate investment—and corporate investment constitutes a large percent of total investment—is generated by corporate income. Given the separation between ownership and management in large corporations today, it is unlikely that management would be influenced by the abolishment of inheritance to reduce the percentage of corporate income used for the replacement of capital and new investment.

Haslett, supra note 76, at 147.

111. D.W. Haslett proposed governmental confiscation undisguised by taxation: [A]ccording to my proposal, a person’s estate would pass to the government, to be used for the general welfare. If, however, the government were to take over people’s property upon their death then, obviously, after just a few generations the government would own virtually everything—which would certainly not be very compatible with capitalism. Since this proposal for abolishing inheritance is supposed to be compatible with capitalism, it must therefore include a requirement that the government sell on the open market, to the highest bidder, any real property, including any shares in a corporation, that it receives from anyone’s estate, and that it do so within a certain period of time, within, say, one year from the decedent’s death. This requirement is, however, to be subject to one qualification: any person specified by the decedent in his will shall be given a chance to buy any property specified by the decedent in his will before it is put on the market (a qualification designed to alleviate slightly the family heirloom/business/farm problem . . . ). The price to be paid by this person shall be whatever the property is worth (as determined by governmental appraisers, subject to appeal) and any credit terms shall be rather lenient (perhaps 10 percent down, with the balance, plus interest, due over the next 30 years).

Id. at 137-38. Haslett also would allow charitable bequests and bequest to the decedent’s spouse and dependent minor children. See id. at 138-39. Clearly there is a flaw here. If the only way to remove a decedent’s property from the government’s hands and return it to the private sector is for the private sector to buy the property, then eventually everything is going to end up in the government’s hands. The offering of low-interest installment sales by the government might mitigate the confiscatory effects. If the decedent dies owning Blackacre, an income-producing tract with a six percent yield, and a family member can buy Blackacre back from the government at four percent interest, Haslett’s system does effectively permit inheritance of value; the interest-rate differential would be the equivalent of an inheritance tax.

Professor Mark Ascher proposed a more sophisticated inheritance-denyng tax scheme, see Ascher, supra note 76, at 121-49, yet even under his proposal, most wealth would end up in the hands of the government after a few generations. He recommends an exemption for spouses, so I suppose wealth
proach. One could employ a confiscatory lottery, in which a decedent’s assets were distributed among lucky private citizens, thereby providing redistributional effects as well. Although such a lottery might seem fanciful, it does show that the abolition of inheritance and testation can be reconciled with the keeping of property in private hands.\textsuperscript{112}

The best arguments in favor of allowing testation are also, paradoxically, the least elegant. The first of these arguments is simply that people want the right to bequeath,\textsuperscript{113} and that—as a matter of the moral principle of respect for individual autonomy and as a matter of self-protection on the part of the governors—the law should give people what they want unless powerful principles or constraints countervail. This argument does not rest on any appeal to natural law and still less on an imputation to property owners of any essential, cross-cultural human instinct to bequeath. It is rather an acknowledgment that for many centuries, “Westerners” have desired to designate the recipients of their property after death.

In the autumn of 1536, after King Henry VIII had begun in earnest his suppression of the Catholic monasteries, a group of English peasants, artisans, and yeomen, whose numbers eventually swelled to 30,000, rose in revolt and marched across the north of England, threatening and sometimes committing murderous violence.\textsuperscript{114} The rebels, adopting the portentous name “the Pilgrimage of Grace,” demanded an end to the suppression of the monasteries, the banishment (or worse) of certain heretical (i.e., anti-Catholic) bishops, the burning of heretical books, and, mirabile dictu, an end to the restrictions on testation effected by the recently enacted Statute of Uses.\textsuperscript{115} This group demanding free testation comprised not powerful landowners but plain yeoman farmers,\textsuperscript{116} for

could be kept out of the government’s hands if each property owner resolved always to be married to someone, however unsuitable.

112. A lottery would also provide a mechanism for abolishing inheritance without giving rise to the breaches of “civil peace” with which Blackstone was concerned. See supra text accompanying note 63.

113. See Simes, supra note 91, at 723.

It is almost axiomatic that one of the most common human wants is the desire to distribute one’s property at death without restriction in whatever manner [one] desires. Indeed, we can go further and say that there is a policy in favor of permitting people to create future interests by will, as well as present interests, because that also accords with human desires.

Id.; see also supra note 63 and accompanying text. One court explained this desire as follows: [T]here is planted in the breast of every person the desire to possess something useful or something pleasing which will serve to render life enjoyable, which shall be his own, and which he may dispose of as he chooses, or leave to his children or his dependents at his decease. To deny [that] the fulfillment of this desire contributes in a large degree to the attainment of human happiness is to deny a fact as patent as the shining of the sun at noonday.


114. See RIDLEY, supra note 46, at 285-87.

115. See id. For a brief discussion of the role of the Statute of Uses in restricting testation, see supra note 55.

116. Ridley notes that “[n]early all the noblemen and gentlemen of Yorkshire had joined the Pilgrimage of Grace,” RIDLEY, supra note 46, at 295, but the Statute of Uses appears to have become a target of the rebels’ anger even before the Yorkshire elite became involved. See id. at 285-86.
whom a right to free testation was worth marching, fighting, and suffering for, even at the risk of suffering the penalties for High Treason.\textsuperscript{117}

The Bolsheviks’ ideology dictated the abolition of inheritance, but their attempts to abolish it proved futile. As one commentator explained:

In 1918, the new Soviet government promulgated a law providing that all property would revert to the state upon the death of its owner. However, the lack of an adequate apparatus to enforce the law and the subsequent “interpretations” that significantly limited its application quickly reduced the law to a mere “declaratory statement.”\textsuperscript{118}

John Galsworthy, in his 1906 novel \textit{The Man of Property}, gave eloquent expression on several occasions to the impulse behind testation. Old Jolyon Forsyte, a wealthy Englishman in his eighties, muses about making his final arrangements:

A new vista of life was thus opened up, a promised land of talk, where he could find a harbour against the waves of anticipation and regret; where he could soothe his soul with the opium of devising how to round off his property and make eternal the only part of him that was to remain alive.\textsuperscript{119}

One of Old Jolyon’s wealthy brothers, James, likewise finds solace in the prospect of bequeathing:

Indeed, in James[,] love of his children was now the prime motive of his existence. To have creatures who were parts of himself, to whom he might transmit the money he saved, was at the root of his saving; and, at seventy-five, what was left that could give him pleasure, but—saving? The kernel of life was in this \textit{saving for his children}.\textsuperscript{120}

But the opportunity that the law provides for realizing these life-giving and civilizing impulses also enables property owners to yield to less benign cravings. Later in the novel, Old Jolyon makes arrangements to change his will, so that the bulk of his property will be left to his only son, young Jolyon, from whom he had once become estranged (and whom he had disinherit under his earlier will) when the son’s socially unfortunate love affair engendered a socially unfortunate marriage. As Old Jolyon walks toward his son’s house,

the thought of the new disposition of property, which he had just set in motion, appeared vaguely in the light of a stroke of punishment, leveled at that family and that Society of which James and [James’s son, Soames,] seemed to him the representatives. He had made a restitution to young Jolyon, and restitution to young Jolyon satisf-

\begin{thebibliography}{9}
\bibitem{117} Only one of the rebels’ demands was eventually met; four years after the Pilgrimage of Grace began, Parliament enacted the Statute of Wills. See \textit{id.} at 296.
\bibitem{118} Katz, \textit{supra} note 63, at 3-4 n.3.
\bibitem{120} \textit{id.} at 57 (emphasis added).
\end{thebibliography}
fied his secret craving for revenge—revenge against Time, sorrow, and interference, against all that incalculable sum of disapproval that had been bestowed by the world for fifteen years on his only son. It presented itself as the one possible way of asserting once more the domination of his will; of forcing James, and Soames, and the family, and all those hidden masses of Forsytes—a great stream rolling against the single dam of his obstinacy—to recognise once and for all that he would be master.\textsuperscript{121}

What began as an impulse to save for one's children and to achieve immortality through a financial beneficence felt even after one's death has now become tainted with thoughts of revenge and domination. A testator requires society's aid, to an extent an inter vivos donor does not, to effect the wealth transfers she wishes to make, and certainly the impulses of saving for one's family and achieving immortality through beneficence deserve society's support.\textsuperscript{122} But given our respect for individual autonomy, a testator is not similarly entitled to enlist society's aid in her quest for posthumous control over her successors' lives.\textsuperscript{123} The Chancery Court of New Jersey used almost that very expression in \textit{Girard Trust Co. v. Schmitz},\textsuperscript{124} when, in declining to enforce a testamentary condition that would have required certain legatees to break off all contact with two of their siblings, the court stated that it would not "lend its hand to help the testator use the power of his wealth to disrupt this family."\textsuperscript{125} More generally,

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\text{[t]he strength of a stranger's claim on us for aid in the fulfillment of some interest depends upon what that interest is and need not be proportional to the importance he attaches to it. The fact that someone would be willing to forego a decent diet in order to build a monument to his god does not mean that his claim on others for aid in his project has the same strength as a claim for aid in obtaining}
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\textsuperscript{121} \textit{Id.} at 208.
\textsuperscript{122} Solomon Rabinowitz, better known by his pen name of Sholom Aleichem, wrote in his will: At my grave, and throughout the whole year, and then every year on the anniversary of my death, my remaining son and my sons-in-law, if they are so inclined, should say \textit{kaddish} [a traditional prayer] for me. And if they do not wish to do this, or if it is against their religious convictions, they may fulfill their obligation to me by assembling together with my daughters and grandchildren and good friends to read this testament, and also to select one of my stories, one of the really merry ones, and read it aloud in whatever language they understand best, and let my name rather be remembered by them with laughter than not at all.
\textsuperscript{123} \textit{Ethical Wills, supra} note 44, at 151.
\textsuperscript{124} I have used the phrase "society's aid" rather than "state action" because I do not wish at this point to raise constitutional issues. The question of whether the Constitution bars a state court from enforcing these conditions will be addressed \textit{infra} notes 186-201 and accompanying text.
\textsuperscript{125} \textit{Id.} at 37. In \textit{Holmes v. Connecticut Trust & Safe Deposit Co.}, 103 A. 640 (Conn. 1918), the testator conditioned legacies on the beneficiaries and the beneficiaries' husbands spelling the family name a certain way and refraining from the use of tobacco and alcohol. See \textit{id.} at 642. The court upheld the condition insofar as it required the beneficiaries themselves to spell their name and behave in that specified way. See \textit{id.} But the court struck down the condition insofar as it conditioned the legacies on the conduct of the legatees' husbands. See \textit{id.} Because the legatees could not control their husbands' conduct, to allow the husbands' conduct to cause a forfeiture of the wives' inheritances would invite "marital discord." \textit{Id.}
enough to eat (even assuming that the sacrifices required of others would be the same). 126

I turn now to the second argument that can be soundly offered in defense of testation, an argument that will enable us to answer the question at hand.

E. Why the Right to Bequeath Should Not Include the Right to Condition Bequests on Conjugal and Religious Choices

I have argued that testation should, because of a widespread desire for it, be allowed by the law, unless powerful principles or constraints countervail. 127 Yet I have also adduced two powerful countervailing constraints: the anomaly of allowing the dead to dictate to the living and the moral hazard problems that such allowance engenders. I argue here that the desire for testation trumps these countervailing constraints but only because denying testation would create more serious anomalies than allowing the practice.

If we did not allow property owners to bequeath, they would employ other devices to achieve the same result: joint tenancies, life insurance, inter vivos trusts. Unless we were willing to abolish inter vivos transfers as well, legal prohibitions against testation would prove to be a paper tiger, as property owners would simply learn to mold their intended transactions into allowable forms. 128 And if we succeeded in abolishing inter vivos gratuitous transfers of property as a backstop to our abolition of testation, we might, in fairness, have to prohibit implicit inter vivos transfers, such as a parent’s providing her children with better-than-average nutrition and education, a perverse variant of the medieval sumptuary laws. 129 Professor Epstein, criticizing the notion that we should abolish inheritance to prevent children of rich parents from beginning life with more advantages than children of nonrich parents, observes that “taking coercive steps to promote a set of equal economic endowments for the unborn” necessarily involves, if we are to be thorough, measures that “violent[ly] disrupt[] . . . the family.” 130

If we did not allow property owners to bequeath, families, knowing that the death of the principal breadwinner would bring an end to their prosperity, might be tempted to conceal the breadwinner’s death. 131

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127. See supra text accompanying note 113.
128. Surely the history of the federal transfer tax system illustrates the folly of treating will substitutes differently from the similar arrangements for which they substitute. See Sherman, supra note 107, at 111-14.
129. The medieval sumptuary laws, which limited the kind of clothes that persons of particular social stations could wear, were designed not to enforce equality but rather to preserve inequality by prohibiting wealthy commoners from dressing like their “betters.” See Christopher Hibbert, The English 35 (1987).
130. Epstein, supra note 73, at 698-99.
131. The world of detective fiction furnishes a noteworthy example in Conan Doyle’s Adventure of
the absence of testation rights (or, at least, intestate succession), death often would mean financial catastrophe for survivors, unless some system of family maintenance were established so that the decedent’s dependents would be guaranteed some minimum provision. The right of free testation minimizes the temptation to conceal property owners’ deaths, and it deals more efficiently with the problems of family maintenance by allowing the property owner herself to provide for her survivors, rather than relying on the courts or legislatures to fashion some rule of general applicability and then apply it, however imperfectly, to a family whose situation the general rule does not really fit. 132 And (most important for our purposes here) in order to allow testation to provide these benefits, it is not necessary to permit the testator to impose restraints on the legatees’ conjugal or religious conduct; merely allowing the testator to designate her legatees and the amounts they are to receive is enough. 133

Prohibiting testation would cause efficiency losses as well. We have noted the efficiency argument for private property—that one will make better use of resources if one knows that the resources are one’s own; that having the exclusive right to the benefits derivable from a resource creates an incentive to use the resource efficiently. 134 If one knew that one’s exclusive right to the benefits from a resource was about to expire, one would become less concerned about efficient use.

Any owner will be more reluctant to invest in long-term improvements when his interest has a limited time horizon. As a matter of theory, the limited interest in property necessarily entails that the party who sows (all) cannot reap (all). The partial mismatch between investment and rewards . . . sets up a serious conflict of interest problem . . . . Inasmuch as the present owner is unable to cap-

Shoscombe Old Place, in which a desperate gambler, residing with his widowed sister on an estate in which she had only a life interest, went so far as to have a male retainer impersonate the sister after her death. See Arthur Conan Doyle, The Adventure of Shoscombe Old Place, in 2 The Annotated Sherlock Holmes 630, 641 (1967).

132. One risk of allowing free testation is that a testator may disinherit her dependents by bequeathing her estate entirely to others. This is a risk that American law, with its tradition of “rugged individualism,” generally has been willing to take. Although American law protects a testator’s surviving spouse against disinheritance, see William M. McGovern, Jr., et al., Wills, Trusts and Estates § 3.8 (1988), America stands “nearly alone among modern nations” in permitting testators to disinherit their children. Ronald Chester, Should American Children Be Protected Against Disinheritance?, 32 Real Prop. Prob. & Tr. J. 405, 406 (1997). Among American jurisdictions, only Louisiana and Puerto Rico protect children against deliberate disinheritance. See La. Civ. Code Ann. art. 1493 (West 1998) (stating that children of the testator who are older than 23 at the testator’s death are not protected unless physically or mentally disabled); P.R. Laws Ann. tit. 31, § 2456 (1996) (enumerating the few permissible grounds for disinheritance one’s children). Other American jurisdictions limit the protection of children from disinheritance to the case of children inadvertently omitted from a testator’s will, see McGovern, Jr., et al., supra, § 3.6, and most states provide various family allowances “to cover the period while the decedent’s estate is being administered.” Id. § 3.5.

133. As we shall see, certain restraints on marriage and certain conditions encouraging divorce have been sustained on the ground that they represented the testator’s attempt to fine tune his bequests so as to better serve the needs of the objects of his bounty. See infra note 154 and accompanying text. For criticism of this benign view of these restraints, see infra notes 162-72 and accompanying text.

134. See supra text accompanying notes 80-83.
ture income after the expiration of his interest, he will quit investing too soon.135

If one knew that one’s resources were, upon one’s death, to revert to the state or be redistributed by lottery, one’s incentive to invest in the preservation of those resources would diminish as death approached. Indeed, as long ago as the thirteenth century, Bracton declared that men would lose with age their incentive to produce and save even if their property automatically passed at death to their widows and children.136 Only free testation— an absolute right given to the owner of resources to designate any successor— would, in Bracton’s view, minimize the incentive problem I have identified. But to minimize the incentive problem, all the law need do is allow the property owner to designate his successors; it is not necessary to grant the property owner the right to condition his bounty on such things as religious and conjugal choices.137 Efficiency dictates only a minimalist right to testation— only enough to avoid inefficiency but not enough to create the moral hazard problems referred to earlier and not enough to test our tolerance for the anomaly of allowing the dead to dictate to the living.

The conclusion that prohibiting testation would cause efficiency losses may be approached from another perspective. We have seen that for the market to generate the most efficient allocation of resources, resources must be freely alienable, so that the less efficient user can transfer them to the more efficient user.138 For an asset to be considered freely alienable, it must be devisable; otherwise, a property owner might be constrained to sell the asset prematurely or impulsively today because tomorrow she might be dead.139 Knowing that she has the right to designate posthumous successors would disincline the property owner to make hasty and improvident inter vivos dispositions. And again, to obtain that beneficial result, it is necessary to give the property owner only the right to name successors, not the right to impose restrictions on the successors’ personal conduct.

One might argue that if allowing a property owner to designate a posthumous successor promotes efficiency, allowing a property owner also to impose testamentary conditions on the successor would promote

135. Epstein, supra note 73, at 695.
137. It must be admitted that the right to make conditional bequests might, at the margin, increase the incentive to produce or preserve wealth. There conceivably could exist some people who, though they have saved enough to provide for their own futures and those of their dependents, would be prompted to save still more by the prospect of using that additional wealth to regulate their survivors’ behavior. This marginal effect is likely to be small, however, and outweighed by a competing consideration—the value the transferee places on the behavior he must forego.
138. See supra text accompanying note 83.
139. If the current owner of an asset is a more efficient user of the asset than her intended transferee, such a compelled inter vivos transfer would cost the economy efficiency advantages for the period between the date of gift and the date of the current owner’s death.
efficiency still more. The argument would run as follows: it is good for efficiency if the property owner knows she can regulate the property to the same extent after death as she can while still alive; inasmuch as a living property owner can withhold bounty from her child because she does not like the child's conjugal choices, she ought to be able likewise to condition her posthumous bounty on the child's conforming to her wishes.

There are two responses to this argument. First, if we define efficiency in terms of aggregate personal satisfaction, posthumous conditions may decrease efficiency inasmuch as the successor's enjoyment of an asset is less untrammelled than his predecessor's. Second, and more important, is the question of society's proper role. If a living person wishes to deny bounty to an adult child because she disapproves of the child's conjugal choices, she need not enlist society's aid in denying wealth to the child (beyond society's general recognition of private property rights). But if a person wishes to extend her influence over her child from beyond the grave by imposing testamentary conditions, society's aid must be enlisted; and as I have urged earlier, it should be considered offensive and unsuitable for society to bring its power to bear when the objective is control by the dead over the personal conduct of the living.  

The minimalist testation theory for refusing to enforce testamentary restraints on personal conduct produces two special results very different from the current state of the law and worth noting explicitly. First, the theory would invalidate even testamentary restraints aimed only at personal conduct occurring before the testator's death. As we have seen, the traditional view of testamentary conditions—the "continuing influence" rationale—upholds those conditions that affect only pre-death conduct, such as a bequest conditioned on the legatee's being divorced by the time of the testator's death. I have shown earlier that the "continuing influence" rationale is unsatisfying as a logical matter, and here I argue that the distinction is unsatisfying as a policy matter as well. Suppose a testator's will provides: "If Mary has divorced Sam by the date of testator's death, Blackacre is to pass to Mary; but if Mary is still married to Sam at testator's death, Blackacre is to pass to Mindy." Although the condition does not purport to control Mary's conduct after the testator's death (and therefore would be valid under current law), enforcement of the condition does require the state to investigate Mary's marital situation and to direct Blackacre away from Mary's hands if her marital situation does not conform to the testator's wishes. That is an intervention that the

140. See supra text accompanying notes 123-26.
141. Most of the conveyances that impose such conditions are testamentary conveyances, but occasionally an inter vivos grant will impose them. See supra note 10. The theory of minimalist testation proposed herein cannot be used to invalidate conditions imposed in an inter vivos grant until after the grantor's death.
142. See supra text accompanying notes 28-31.
143. See supra text accompanying notes 33-34.
144. See, e.g., In re Clarke's Estate, 57 P.2d 5, 8 (Colo. 1936).
state may not with propriety perform. A dead property owner may not rightfully enlist society’s aid in carrying out such a posthumous inquisition. To foster the efficient allocation of resources, it is enough if we allow the testator to designate his successor without regard to the successor’s marital status.145

The second special result of the minimalist testation theory is that it would likewise prohibit “good” testamentary restraints if those restraints deal with such personal matters as conjugal or religious choices. It has sometimes been held that, given public policy favoring marriage and disfavoring licentiousness, a testamentary condition tending to discourage marriage is void: for example, a bequest to A; but if A ever should marry, then to B.146 If the objection to testamentary restraints against marriage is framed only in terms of this anti-licentiousness analysis, there ought to be no objection to a testamentary condition requiring marriage—for example, a bequest to A only if A marries—and, indeed, the few cases that deal with such restraints uphold them, generally without discussion.147 But when one objects, as I do, to testamentary restraints against marriage because of their intrusiveness and on the ground that they go beyond minimalist testation, a condition requiring marriage should be held as invalid as a condition forbidding marriage. As to the intrusiveness point, a dead person is no more entitled to enlist society’s aid in posthumously inducing marriage than in posthumously discouraging it. Indeed, if the

145. See supra text accompanying notes 135-40.

146. See GA. CODE ANN. § 19-3-6 (1991); IND. CODE ANN. § 29-1-6-3 (Michie 1998) ("A devise to a spouse with a condition in restraint of marriage shall stand, but the condition shall be void."); Knost v. Knost, 129 S.W. 665, 667 (Mo. 1910); Goffe v. Goffe, 94 A. 3, 5 (R.I. 1915).

147. See Traders Nat’l Bank v. Levine, 528 S.W.2d 497, 500 (Mo. Ct. App. 1975); In re Vessell’s Estate, 148 N.Y.S.2d 443, 445 (Sur. Ct. 1955) (discussing whether a testamentary inducement to marriage applied to a legatee’s third marriage or only to her first; in deciding that it applied to the third marriage, the court implicitly upheld the validity of the testamentary inducement); Fisher v. Harrison, 182 S.E. 543, 544 (Va. 1935).

In Dickey v. Citizens’ State Bank, 180 N.E. 36 (Ind. Ct. App. 1932), the court dismissed as “highly presumptuous” the argument that a condition requiring marriage was void because it was calculated to induce the legatee to marry for monetary gain rather than for affection. See id. at 37. The court noted that the testator had made other unconditional gifts to the same legatee, and the court accordingly inferred that the bequest was made conditional not to induce marriage but to limit the particular bequest to a situation in which the legatee’s needs were greater (i.e., the legatee was married). See id. Thus, the court suggested that the testator’s motive had some bearing on the bequest’s validity. See id.

In three other cases, the gift was conditioned on the legatee’s being married at the date of the testator’s death, so the condition could be upheld on the usual ground that it did not purport to affect posthumous conduct. See Hungerford v. Trust Co., 9 S.E.2d 630, 631 (Ga. 1940); First Nat’l Bank v. Wolff, 202 P.2d 878, 882 (Neve. 1949); In re Estate of Heller, 159 N.W.2d 82, 83 (Wis. 1968); supra text accompanying notes 28-32.

A condition might accelerate a beneficiary’s interest in the event she marries. For example, a will might provide that a devised (especially a female devisee) to receive the property when she attains 21 or, if earlier, when she marries. These conditions seem to be accepted without objection. See Perrin v. Lyon, 103 Eng. Rep. 538, 538 (Ch. 1807) (discussing a condition against marriage to a Scot but not mentioning the “earlier of 21 or marriage” condition that the will also imposed); Ward v. Van der Looff, 1924 App. Cas. 653, 653 (appeal taken from Eng.). Perhaps the thought is that a “rich emancipated female minor” is a frightening prospect, but if she has adulthood or a husband to rein in her prodigality, she can be trusted with wealth.
II. THE THEORY AND CURRENT CASE LAW COMPARED

Let us turn now to a brief examination of existing case law and see how the minimalist testament theory would alter the legal landscape by more severely limiting the freedom of testators to restrain their legatees’ conduct and eliminating courts’ opportunities to draw some indefensible distinctions.

A. Conditions Inducing Divorce

Suppose a testator bequeathes property “to A for life, remainder to B; but if A should divorce her husband or if A’s husband should predecease A, the property shall thereupon pass to A absolutely.” This condition could serve to induce divorce, since the prospect of enlarging her life estate into an absolute interest might induce A to leave her husband or, at least, might aggravate those dissensions that inhere in married life until they assume sufficient magnitude to precipitate a complete breach.140

148. The characterization of a marriage between a gay man and a woman as “fraudulent” needs to be qualified. Certainly, gay men have married and have fathered children, Oscar Wilde and Leonard Bernstein being among the better-known gay husbands/fathers. And I would not disparage as a fraud the marriage between George Bernard Shaw and his wife Charlotte simply because their marriage reportedly was entirely sexless. Nor could a bride be said to have been defrauded if the groom disclosed the facts of his sexuality to her before the marriage ceremony. When I say that the marriage induced by such a testamentary condition would be fraudulent, I have in mind that the man would be entering into an endorsed union with someone with whom he would not otherwise be disposed to unite; that he would be entering into the union not out of that desire to cherish which our society holds to be the very bedrock of the institution of marriage, nor even out of a desire to be married, but rather out of a desire to outfox a testator and come within the literal language of a testamentary condition though not within its spirit. An analogy might be made to Minary v. Citizens Fidelity Bank & Trust Co., 419 S.W.2d 340 (Ky. Ct. App. 1967), where one Alfred Minary, a beneficiary under a trust created by his mother for the benefit of the mother’s heirs, adopted his own wife as his child so that the wife would qualify as one of the settlor’s heirs after Alfred’s death. See id. at 341. Although the adoption of the wife was quite legal as a matter of adoption law, see Minary v. Minary, 395 S.W.2d 588 (Ky. Ct. App. 1965), the court found that the adoption of the wife for the purpose of bringing her within the provisions of the preexisting trust instrument was “an act of subterfuge” not to be countenanced. Minary v. Citizens Fidelity, 419 S.W.2d at 343.

In United States v. Phillips, 49 M.J. 521 (U.S. Navy-Marine Corps Ct. Crim. App. 1998), a military court affirmed the larceny conviction of a gay Navy man charged with having entered into what the court called a “sham marriage,” id. at 523, with a woman for the purpose of receiving supplementary financial benefits intended only for the “support of legitimate spouses and other valid dependents.” Id. The court upheld the admission of evidence of the defendant’s “prior homosexual conduct” as bearing on the government’s claim that the marriage was a sham. Id. at 525-26.

In the case of the hypothetical testator who conditioned his bounty on his gay son’s marrying, perhaps such a “spurious” marriage was just what the testator intended to induce; the testator may have wished only that his gay son present a married face to the world, however hypocritically.

149. See 1A SCOTT ON TRUSTS, supra note 34, § 62.1; see also In re Estate of Sage, 412 N.Y.S.2d 764 (Sur. Ct. 1979) (holding that a trust could not reimburse a beneficiary for bribes made to procure the release of the beneficiary’s son and daughter-in-law from foreign imprisonment under barbaric conditions). The condition might also be regarded as encouraging murder because A could acquire her ab-
A few early courts saw no problem with such conditions; they noted that divorce is not unlawful and argued that there can be no public policy objection to inducing an individual to perform a lawful act. 151 The flaw in this reasoning, of course, is that to constrain someone to perform a legal act may be no less objectionable than to constrain her to perform an illegal one. Celibacy is not unlawful, yet courts routinely strike down condi-

solute interest by killing her husband, but courts never have taken seriously this inducement-to-murder objection. Most courts simply assert, without examination, that a bequest-induced homicide is not very likely to occur or at least not much less likely than a bequest-induced divorce as to be beyond consideration. In In re Seaman, 112 N.E. 576 (N.Y. 1916), for example, the court brushed aside this inducement-to-murder objection, finding that the party making it was “distorting the provisions of the will.” Id. at 579. It is worth noting that the individual in the Seaman case whose death would have increased the legatee’s inheritance acted as the legatee’s attorney in the proceeding brought to invalidate the condition. See id. at 577. This choice of counsel suggests either that the legatee had such confidence in him that he need not have feared for his life or that the legatee chose him to represent her because, since the testamentary condition threatened his life, he would have great incentive to argue for its invalidity. In Cowley v. Twombly, 53 N.E. 886 (Mass. 1899), the court pointed out that murder, unlike divorce, is an illegal act, so it would be wrong to infer that a mere bequest would suffice to induce it. See id. at 887.

This “murder is unlikely” argument is profoundly unsatisfying. First, bequest-induced murder is not at all unlikely; otherwise, we would not have so many slayer-rule cases. See generally Jeffrey G. Sherman, Mercy Killing and the Right to Inherit, 61 U. Cin. L. Rev. 803, 844-56 (1993). Second, likelihood is not the issue. A conditional bequest of $50 million is more likely to induce a divorce than a conditional bequest of $50,000; but courts, in their attempts to grapple with conditions encouraging divorce, never have considered the size of the bequest in their analysis. The issue is more one of offensiveness. If a testator gave property to A upon the condition that A kill B, “[n]o one would doubt that such a condition would be illegal, not so much because A would be likely to kill B, however, but because the court would find it offensive to enforce the condition upon A’s failure to commit a crime.” Browder, supra note 55, at 1328. But if a testator gives property to B for life, remainder to A upon the condition that A survive B, no offensiveness problem is presented. Instead, the testator has simply imposed a condition of survivorship, and no reason exists to prohibit a property owner from yielding to the natural impulse of providing for the successive enjoyment of property by different persons or generations. See Baker v. Hickman, 273 P. 480, 481 (Kan. 1929) (explaining that survivorship conditions in wills “have never been held invalid for the reason that they tend to induce the beneficiaries to kill the person named; . . . rather, [they] are construed as arising from the lawful ideas of the testator that the death of the person named would eventually take place from natural causes”). If in fact A kills B, the slayer rule is there to prevent injustice. If a remainderman kills the life tenant, the slayer rule likewise bars the remainderman from succeeding to the property. See Petrie v. Chase Manhattan Bank, 328 N.Y.S.2d 312, 315 (App. Div. 1972), modified, 307 N.E.2d 253 (N.Y. 1973); see also R.I. Gen. Laws § 33-1.1-9 (1995); Wash. Rev. Code § 11.84.080 (1996). But see In re Emerson’s Estate, 183 N.W. 327, 329 (Iowa 1921); Blanks v. Jiggles, 64 S.E.2d 809, 812-13 (Va. 1951).

The world of charitable giving recently furnished a striking example of a testator desiring to create successive interests. Abby Aldrich Rockefeller, a principal benefactor of New York’s Museum of Modern Art (MOMA), bequeathed two Van Gogh drawings and two Seurat drawings to MOMA but only for 50 years. She thought that MOMA should be devoted exclusively to the truly modern and that these Van Gogh and Seurat works would no longer qualify as modern after the 50-year term, so she bequeathed the “remainder interest” in the Van Goghs to New York’s Metropolitan Museum of Art and the two Seurats to the Art Institute of Chicago. See Bruce Handy, The Expiration-Date Culture, Time, Nov. 9, 1998, at 112.

tions that purport to completely restrain first marriages.\textsuperscript{152} Eventually, therefore, courts abandoned their totally permissive approach to conditions inducing divorce\textsuperscript{153} but replaced it with one almost as unsatisfactory.

Courts tend now to investigate the testator's motive. If a testator who conditioned A's bequest on A's divorcing B actually intended to induce A to divorce B, the condition will be held void. But if the testator's intention was economic— for example, to insulate A from B's prodigality or to provide A with additional funds in the event A ceased to be entitled to look to B for support— then the condition will be upheld.\textsuperscript{154} The 1993 Estate of Donner\textsuperscript{155} case provides a useful illustration. Alfred Donner bequeathed a portion of his estate in trust for the benefit of his daughter, Tweedy, and her children. Tweedy was given a life income interest and a power to invade corpus in certain circumstances, but the trust instrument postponed Tweedy's income right and invasion power until her sixty-fifth birthday unless, before that date, her husband (Martin) died, or she and Martin divorced. Tweedy argued that the purpose of the condition was to induce divorce, that it was therefore void on public policy grounds, and that she was accordingly entitled to the income and invasion power immediately. The court disagreed. Although the court acknowledged that the testator disliked and mistrusted his son-in-law,\textsuperscript{156} the court upheld the condition because there was "a reasonable economic basis" for it; the testator wanted to withhold Tweedy's income and invasion power until such time as her need for an additional source of funds arose, either because "she los[ter] her husband, the breadwinner of her family, through . . . death or divorce" or because her husband's retirement (which the testator evidently expected to occur when Tweedy reached sixty-five) brought an end to their other sources of income.\textsuperscript{157} Indeed, the court went rather far and suggested that the condition would be valid even if one of the testator's motives for imposing the condition was to induce divorce, as long as

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\textsuperscript{152} See \textit{supra} note 146 and accompanying text; see also 6 \textit{American Law of Property}, \textit{supra} note 21, at 668-69.

\textsuperscript{153} Before the days of "no-fault" divorce, when divorce was obtainable only in response to a spouse's wrongful conduct, a court might invalidate a condition inducing divorce on the ground that the condition induced the wrongful conduct necessary to procure a divorce. See, e.g., \textit{Dwyer v. Kuchler}, 174 A. 154, 156 (N.J. Ch. 1934). A later New Jersey case, which upheld the validity of a divorce-inducing condition, noted the \textit{Dwyer} case but ignored it, see \textit{In re} Estate of Donner, 623 A.2d 307, 308-09 (N.J. Super. Ct. App. Div. 1993), presumably because during the intervening years, New Jersey had become a no-fault state. See N.J. \textit{Stat. Ann.} § 2A:34-2, cl. d (West 1987) (effective 1971).

\textsuperscript{154} See 1A \textit{Scott} on \textit{Trusts}, \textit{supra} note 34, § 62.4.

\textsuperscript{155} Probably in the last analysis the question is whether the settlor is . . . [using] his property in order to induce the disruption of a family relation of which he does not approve, or whether he is . . . making provision for the object of his bounty in such a way as to give her support when she has no husband to support her or to give her an opportunity to enjoy his bounty free from the injurious control of it by her husband.

\textit{Id.}

\textsuperscript{156} \textit{Estate of Donner}, 623 A.2d at 307.

\textsuperscript{157} \textit{Id. at} 309 ("He believed that her husband had tricked him into investing $10,000 in a worthless venture. He also knew that her husband's financial affairs were under Federal investigation.").

\textit{Id.}
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some other motive was economic. There was to be no weighing of the improper motive against the proper.\textsuperscript{158}

Gender figures prominently in some courts’ analysis of the motive question. A bequest conditioned on a woman’s divorce may survive challenge where a bequest conditioned on a man’s divorce would not.\textsuperscript{159} One court in 1938 observed:

Now where the trust is for a married daughter, it must be conceded I think that there is more reason [to uphold the validity of a condition that gives the life tenant an absolute interest in the event of divorce] than where the trust is for a married son... This is because a wife is in such a state of dependence upon her husband and frequently so far under his control, that a gift of trust income to her during marriage and of the principal to be disposed of by her absolutely in case of divorce from her husband, obviously can muster more of [an] argument in its support than can the case of a similar bequest in trust for a married son.\textsuperscript{160}

This gender-based distinction has driven judicial decisions even as late as 1972.\textsuperscript{161}

Determining the validity of divorce-related conditions by inquiring into the testator’s motives is unsatisfactory for three reasons. First, subjective motive is difficult to divine and easy to manufacture through fanciful posthumous imputation. It is difficult enough to infer what a testator intended to do with her property;\textsuperscript{162} to infer why she wanted to do it requires the court to engage in potentially limitless speculation. To show how far courts are willing to go in that direction, consider In re Ringer’s Estate.\textsuperscript{163} There, a testator bequeathed to his son a life estate in trust but provided that the life estate should become an absolute interest if the son divorced (or survived) his wife. The court, in upholding the condition, split hairs rather ingeniously by asserting that, according to the will, the property interest was to be made absolute not when the son became “divorced” but rather when he became “unmarried.”\textsuperscript{164} Evidently striving to

\textsuperscript{158} See id. The Supreme Court of Illinois, on the other hand, when dealing with a similar testamentary condition, held that a weighing of motives was correct. See In re Estate of Gerbing, 337 N.E.2d 29, 32-33 (Ill. 1975) (“[If the dominant motive of the testator is to provide support in the event of such separation or divorce[,] the condition is valid.”). Finding no evidence of the benign motive, the Illinois court struck down the condition. See id. at 35.

\textsuperscript{159} Cf. infra text accompanying notes 213-16 (discussing the “gendered” treatment of conditions restraining second marriages).

\textsuperscript{160} Davidson v. Wilmington Trust Co., 2 A.2d 285, 289 (Del. Ch. 1938).

\textsuperscript{161} See Alexander v. Hicks, 488 S.W.2d 336, 338 (Ky. 1972).

\textsuperscript{162} See, e.g., In re Estate of Black, 27 Cal. Rptr. 418, 420 (Ct. App. 1962). In Estate of Black, a testator had bequeathed her estate to “the University of Southern California known as The U.C.L.A.” Id. Inasmuch as the University of Southern California is known as U.S.C., while U.C.L.A. is a different university entirely, judicial intercession was required to determine which institution the testator wished to benefit. See id. at 428.

\textsuperscript{163} 157 A. 488 (Pa. 1931).

\textsuperscript{164} Id. The source of this delicate distinction was the alternative condition; the son’s interest became absolute if he survived his wife. See id. That is, the interest became absolute if, because of divorce or survivorship, the son ceased to be a married man.
unearth a benign motive for the condition, the court averred that a married man needs the assurance of a steady, dependable stream of income (a life estate under a trust), while an unmarried person can use the property outright because he no longer needs the protection of a trust. That is perverse reasoning, to say the least. One would think that a married person needed more property, not less. In In re Tiemens’ Estate, a testator tried to shield his plans from judicial interference by reciting a benign motive in the will. Upon his son’s divorcing or surviving his wife, the son’s interest was to become absolute “as a solace to him in the event of such ... sorrow.” I doubt that anyone was deceived, but the condition was nevertheless upheld. It is difficult to imagine that a testator would insert such a condition in a will without some hope of at least facilitating the legatee’s divorce. When one compares the cases upholding these conditions with those condemning them, one finds no sound, predictable foundation for the different conclusions reached.

Second, if subjective motive can change an otherwise valid conditional bequest into an invalid one, why do we not invalidate a malignly motivated unconditional bequest? One can imagine a situation in which a testator, who disliked her son-in-law but believed that her daughter would not divorce him lest she thereby be impoverished, bequeathed money to her daughter unconditionally in the hope that the daughter’s sudden wealth would embolden her to seek the divorce her mother wanted for her. Clearly, we would uphold such an outright bequest, despite its author’s motive. If we ignore motive when faced with an unconditional bequest, how can we properly consider motive in the case of a conditional bequest?

The third objection to considering the testator’s subjective motive is that if the condition in fact has the potential to induce divorce or at least aggravate marital differences, it is irrelevant that the testator did not consider that possibility or had entirely different motives. Focusing on

165. See id.
166. 277 P. 385 (Wash. 1929).
167. Id.
168. For examples of cases condemning such conditions, see In re Estate of Gerbing, 337 N.E.2d 29, 35 (Ill. 1975); In re Will of Agnew, 174 N.Y.S.2d 1008, 1012 (Sur. Ct. 1957); Graves v. First Nat’l Bank, 138 N.W.2d 584, 592 (N.D. 1965).
169. One commentator has stated, “[T]o justify a restraint on the ground that the testator’s intention was not to restrain marriage but to provide for the support of a particular beneficiary does not make the restraint any the less offensive if it does indeed discourage marriage or remarriage.” Gareth H. Jones, The Dead Hand and the Law of Trusts, in DEATH, TAXES AND FAMILY PROPERTY 119, 127 (Edward C. Halbach, Jr. ed., 1977).

One court quite properly rejected motive as the touchstone but succumbed to a different sort of error. The testator’s will had left property in trust for her daughter Margaret, who was to receive the income as long as she remained married to Ralph:

If her said husband, Ralph Callin, shall predecease her, or if the marriage of the said Margaret Callin and Ralph Callin should be dissolved or terminated in any other way except by the death of the said Margaret Callin, then the corpus of this trust, both principal and increment, shall be paid over to said Margaret Callin outright and in fee absolutely.

In re Dunbar’s Will, 71 N.Y.S.2d 287, 289 (Sur. Ct. 1947). The court stated that the validity of the condi-
motive, courts overlook what makes such conditions objectionable in the first place; that it is an offensive spectacle for the state, at the behest of a dead person, to shift wealth from B to A as a reward for A’s obtaining the divorce the decedent desired.\textsuperscript{170} To reap the benefits of allowing testation and to avoid the pitfalls that disallowing testation would entail, it is unnecessary for the state to execute this kind of posthumous command. A testator who is genuinely concerned about seeing to the support needs of an individual can do so without creating such objectionable and intrusive inducements.\textsuperscript{171} A discretionary support trust, whose trustee is directed to disburse to the individual whatever amounts are from time to time necessary to support her, will serve that purpose nicely.\textsuperscript{172}

\textsuperscript{170} Cf. supra text accompanying notes 123-25 (condemning the use of law to create family discord through testamentary provisions).

\textsuperscript{171} Id. at 303. The testator in \textit{Estate of Gerbing}, 337 N.E.2d at 29, anticipated this kind of supervision problem. She left the residue of her estate in trust. Her son was to receive only the income (plus the right to demand corpus in certain situations), but if he divorced his wife, he received the property outright. The will specified, however, that he had to remain divorced for two years to satisfy the condition. \textit{See id.} at 31.

\textsuperscript{172} One might wonder why a support trust is permissible when a condition “inducing divorce,” even if the condition is intended to provide support for a divorcé(e) who unexpectedly needs it, is impermissible? After all, in each case, the testator intends that the beneficiary’s divorce will precipitate an enlargement of her share of the testator’s wealth. The difference may be one merely of form, but form is not unimportant. The resolution of the problem of testamentary restriants calls in part for the identification of the kinds of personal designs that society’s aid may properly be invoked to further. Given the policy of limiting testation to “minimalist” purposes, the state offends when it announces to a beneficiary at the behest of a dead person, “We will deny you this property unless you oblige us by getting a divorce.” There is nothing offensive about a trustee, in the exercise of its discretion, determining how much a beneficiary needs for his support from time to time as conditions change. A system of law necessarily involves the drawing of lines; the fact that a difficult case can be constructed should not suffice to nullify an otherwise satisfactory differentiation. We are willing to accept support trusts. A beneficiary’s support needs might be magnified by many developments, such as retirement, disability, and, yes, divorce, and the trustee should be permitted to consider all of them. I suppose one could decree, in the interests of formal equality
In short, a blanket rule invalidating all conditions that “reward” divorce is simpler and more predictable in its application, and more principled in its foundation, than the currently prevailing judicial response.

B. Conditions Restraining Religious Practice

A testator might wish to condition a bequest on the legatee’s either adhering to, or abjuring, a particular religious faith or rearing his children in a particular faith. For example, a testator might bequeath property to A; but if A should ever become a Roman Catholic (or if A should ever cease to be a Methodist, or if A should ever fail to bring her children up as Jewish), then there would be a gift over to B. Courts have almost invariably sustained such conditions against public policy challenges. Indeed, not since 1925, in In re Devlin’s Estate Trust, has a state appellate court invalidated a testamentary religious restraint, and the Devlin’s Estate Trust court did so more because enforcement would have caused parent/child conflict than because enforcement of the religious restraint was per se objectionable.173 Thus, Devlin’s Estate Trust cannot serve as precedent for striking down a religious condition not involving a potential religious split between a parent and his or her minor children, and indeed a later case that upheld a religious restraint, albeit over a sharp dissent, distinguished Devlin’s Estate Trust on that very basis.174

The only reported post-1925 case to strike down a testamentary condition constraining religious practice was a 1958 probate court decision175 in which a codicil to the testator’s will provided that an interest given to his granddaughter under the will would be suspended if she “bec[ame] associated with the Roman Catholic Church, either as a member of said Church or as a Sister, or in a lesser or greater capacity in an Order of said Church, or as a student in a school or university conducted

of treatment with testamentary restraints, that every support trust must expressly bar the trustee from considering the beneficiary’s marital status in determining the beneficiary’s support needs, but I am not prepared to go so far.

The support trust device can be a substitute for another kind of condition as well: a condition encouraging procreation. A trust that provides for corpus distributions to the income beneficiary in the event he has a child could be characterized as an indecent intrusion into his most intimate affairs and might indeed be intended by the testator as an inducement to breed. A support trust, with general language instructing the trustee to consider the beneficiary’s family obligations in determining the dollar amount necessary for his support, can accomplish the testator’s legitimate concerns about the expenses attendant upon having children.

173. In re Devlin’s Estate, 130 A. 2d, 239 (Pa. 1925) (examining a will that required the testator’s minor grandchildren to be raised as Catholics although their widowed mother was Protestant). But see In re Carpel’s Estate, 250 N.Y.S. 680, 689 (Sur. Ct. 1931), which involved a testamentary trust directing that a specified sum of money be disbursed for the education of the testator’s 11-year-old daughter only if the daughter attended the particular schools chosen by the trustees, with a gift over if the daughter failed to attend the schools the trustees selected. See id. The court found the restriction “so calculated to separate mother and child and break down parental control and filial love and respect, and so coupled with harsh and cruel penalties that [it was] undeniably against public policy and void.” Id.


by said Church.” 176 The court held the condition void, without discussion. 177 Perhaps the probate court regarded a restraint against adhering to a particular religion as more offensive than a condition inducing adherence.

Earlier American jurists would find little comfort in such a distinction, for they regarded inducements to religious adherence as no less offensive than inducements to religious abjuration. In the venerable case of Maddox v. Maddox’s Administrator, 178 Virginia’s highest court struck down a condition requiring the residuary legatees to be members of the Society of Friends at the time of the testator’s death. 179

I regard a restriction imposed by the terms of a bequest, requiring as the condition of its enjoyment, that the legatee should be a member of any religious sect or denomination, as . . . pregnant with evil consequences. It holds out a premium to fraud, meanness and hypocrisy; it tends to corrupt the pure principles of religion, by holding out a bribe for external profession and conformity to a particular sect. 180

As if to illustrate the Virginia court’s point about inducements to hypocrisy and the modern tendency to disregard them, the Supreme Court of Pennsylvania, in a 1975 case upholding such a testamentary inducement, noted that the will did not require the legatees to embrace any particular religious doctrine: “All that need be determined is whether the beneficiaries are or are not members of the specified church.” 181 In an earlier age, when religious freedom was newly won and religious integrity more fully embraced as a core constituent of personal identity,

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176. Bachman Trust, 48 Luzern Legal Register at 301, 8 Fiduciary Rep. at 459.
177. See Bachman Trust, 48 Luzern Legal Register at 302, 8 Fiduciary Rep. at 460.
178. 52 Va. 804 (1854).
179. See id. at 814-15. Evidently, the Virginia court was not persuaded by the “continuing influence” rationale. For an explanation of the continuing influence rationale, see supra text accompanying notes 26-32.
180. Maddox, 52 Va. at 814-15. Another Virginian, James Madison, made a similar point about hypocrisy in a singularly eloquent passage. When there was put before the General Assembly of the Commonwealth of Virginia a bill to establish a provision for teachers of the Christian religion, an offended Madison admonished the legislators:

[The bill tends] to weaken in those who profess this religion a pious confidence in its innate excellence and the patronage of its Author, and to foster in those who still reject it a suspicion that its friends are too conscious of its fallacies to trust it to its own merits.


It would be naïve to overlook altogether the possibility that the court in Maddox was less high-minded than Madison and struck down the restraint not out of dislike for religious hypocrisy but out of dislike for Quakerism.

181. In re Estate of Laning, 339 A.2d 520, 523 (Pa. 1975); see also Delaware Trust Co. v. Fitzmaurice, 31 A.2d 383, 389 (Del. Ch. 1943), aff’d in part and rev’d in part on other grounds, 38 A.2d 463 (Del. 1944) (upholding a condition requiring the legatee to “profess” to follow and observe the teachings of the Roman Catholic Church).
judges might have been more offended by a testator's attempt to purchase religious fealty. In today's more secular age, judges, confronted with a testamentary provision requiring a legatee to choose between pecuniary self-interest and sectarian loyalty, may be more inclined to regard the restraint indulgently as a mere unenlightened intrusion rather than an assault on the legatee's sense of self.

Religious conditions almost invariably present interpretive problems. How, for instance, does a court, unable to read minds, determine whether a legatee has complied with a condition requiring "adherence" to a particular faith? Even a condition relating only to objective behavior is likely to prove difficult to enforce. In In re Paulson's Will, the testator bequeathed to her son an annuity "made conditional that my son attend the regular meetings of worship of the Emanuel Church near the village of Cashton, Wisconsin, when not sick in bed, or prevented by accident or other unavoidable occurrence." Must the son attend every regular (whatever that is) meeting? Is a vacation an "unavoidable occurrence"? The court brushed over these problems, deeming them a matter of will construction to be addressed at the proper time. But, under this kind of condition, the "proper time" is guaranteed to arrive, and it is difficult to see on what basis the court can make a decision. At the very least, the court will be called upon intrusively to monitor the annuitant's churchgoing (or, more likely, to rely on the monitoring done by a residuary legatee bent on proving that the annuitant has forfeited his benefit).

Is there a constitutional objection to judicial enforcement of these testamentary conditions affecting religious practice? The case that comes to mind as the most likely source of constitutional objection is Shelley v. Kraemer. There, the U.S. Supreme Court held that although a racially discriminatory agreement between private individuals did not by itself violate the Constitution, there being no "State action," the enforcement of that agreement by a state court did constitute state action denying certain persons the equal protection of the laws and therefore violated the Fourteenth Amendment. Does it follow from Shelley that the U.S. Constitution prohibits a court from enforcing a testamentary condition barring a legatee from inheriting unless she adopts a particular religion?

182. See Clayton v. Ramsden, 1943 App. Cas. 320, 320 (appeal taken from Eng.) (holding such a testamentary condition void for uncertainty). "Uncertainty" can be a convenient rationale for striking down other objectionable conditions. See, e.g., Watts v. Griffin, 50 S.E. 218, 220 (N.C. 1905) (striking as indefinite a condition against marrying "a common woman"); see also Turner v. Evans, 106 A. 617 (Md. 1919) (involving a condition against marrying someone not a social equal). Clearly, both Watts and Turner reached the correct result, but the conditions they invalidated would have been just as objectionable had they been cast in more specific language (such as a condition against marrying a woman who dropped out of high school and earned less than $20,000 per year in the year prior to marriage).

183. 107 N.W. 484 (Wis. 1906).
184. Id. at 485.
185. See id.
186. 334 U.S. 1 (1948).
187. See id. at 13.
Shelley v. Kraemer has been cited in only two reported cases dealing with testamentary conditions affecting religious practice, and on each occasion the court upheld the validity of the condition and found Shelley to be inapposite. In United States National Bank v. Snodgrass, the court simply asserted, without discussion, that Shelley was not pertinent. The court in In re Estate of Laning seemed willing at least to consider the possibility that Shelley might, in some cases, bar the enforcement of a testamentary condition, but the court ultimately concluded that, unlike the state that proposed to enforce the racial covenant in Shelley, the state in Estate of Laning had a "compelling . . . interest" in enforcing the condition "because the testatrix sought by this bequest to further her own free-exercise interest in seeking adherents to her faith."

More specifically, the testator in Estate of Laning had imposed, as a condition precedent to receiving trust property, a requirement that the legatees be "members in good standing of the Presbyterian Church." The court regarded the condition not as one calculated to restrict the legatees' religious choices but rather as one designed to propagate the testator's own religion and evidently thought that the judicial enforcement of the latter did not raise the same constitutional problems as enforcement of the former. I see no difference between the two. From the legatees' point of view, the result is the same: they are barred from receiving a legacy because their religion is not one the testator would have preferred them to adopt. The Estate of Laning court's faint implication that there would have been a greater constitutional objection to the enforcement of the pro-Presbyterian condition if the testator who imposed it had been a non-Presbyterian is an idea that cannot seriously be entertained. Furthermore, if an all-Christian legislature enacted a statute requiring all candidates for public office to be professing Christians, the statute would not withstand a First Amendment challenge even though the statute's supporters might characterize it merely as an attempt by the legislators to "seek adherents to [their] faith."

I am inclined to think there is no constitutional objection to a state court's enforcing a testamentary condition affecting religion practice. Of

188. 275 P.2d 860 (Or. 1954).
189. See id. at 866. Shelley has been cited in several cases dealing with testamentary conditions restricting a legatee's marital choices to persons of a specified religion, as distinguished from conditions restraining a legatee's religious practices. In Gordon v. Gordon and Shapiro v. Union National Bank, the courts went slightly further than the Snodgrass court; they at least recognized the Shelley-based argument before dismissing it as inapposite. See Gordon v. Gordon, 124 N.E.2d 228, 235 (Mass. 1955), cert. denied, 349 U.S. 947 (1955); Shapiro v. Union Nat'l Bank, 315 N.E.2d 825, 827-28 (Ohio C. P. 1974). In Gordon, the court noted there was no denial of religious freedom inasmuch as the beneficiary was free to reject the gift. See Gordon, 124 N.E.2d at 233, an argument that seems to miss the point of the entire body of law responding to unconstitutional conditions. See supra text accompanying note 75.
191. Id. at 526.
192. Id. at 521.
193. See id. at 526.
194. Id.
course, the meaning and reach of *Shelley v. Kraemer* have been much disputed. The case cannot mean, for instance, that the Constitution is violated whenever a state court enforces an individual’s lawful but discriminatory act; otherwise, a white bigot could not receive court assistance in barring a nonwhite trespasser from his house.\(^{195}\) Although court enforcement of the anti-trespassing law would constitute “state action,” it would not be “discriminatory” state action. I would distinguish *Shelley* from the cases of testamentary restraints in this way: In *Shelley*, the state court was not acting neutrally. A willing buyer and a willing seller had reached agreement as to the sale of property, but the state court came between them and barred the sale because the buyer was African-American. In the case of a testamentary religious condition, in contrast, the state probate court is acting neutrally, simply distributing a decedent’s property according to the decedent’s wishes, as a court would do in the case of any decedent. The discrimination is the testator’s, not the court’s.\(^{196}\)

Consider the case of *Evans v. Abney*.\(^{197}\) Under his 1911 will, Senator Augustus Bacon bequeathed a tract of land in trust to the mayor and council of the city of Macon, Georgia, to be used as a park for “white women, white girls, white boys, and white children.”\(^{198}\) After the U.S. Supreme Court held that the racial restriction attached to the bequest in public trust was void under the Fourteenth Amendment,\(^{199}\) the Supreme Court of Georgia, on remand, refused to apply the doctrine of cy pres; that is, it refused to modify the charitable trust so as to preserve the trust for park use by opening the park to people of all races. Rather, the state court held that the voiding of the condition rendered the trust impossible of performance, and accordingly the land passed to Bacon’s heirs under the neutral rule applicable whenever a private testamentary trust becomes impossible of performance.\(^{200}\) The U.S. Supreme Court upheld

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\(^{195}\) *See Lawrence H. Tribe, American Constitutional Law* § 18-3, at 1702 (2d ed. 1988).

\(^{196}\) It might be argued, to the contrary, that “neutrality” is an illusion—that a probate court’s enforcement of a religious testamentary restriction is a conscious judicial choice to carry out a testator’s discriminatory intent. Professor Sunstein has observed that a governmental policy of economic laissez-faire is not a neutral position but rather a conscious choice to allow market forces to operate unchecked. *See Cass R. Sunstein, Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1697 (1984) (“[T]he theoretical basis of the *Lochner* era foundered on a mounting recognition that the market status quo was itself the product of government choices.”).

\(^{197}\) 396 U.S. 435 (1970), aff’g 165 S.E.2d 160 (Ga. 1968).

\(^{198}\) *Evans v. Abney*, 165 S.E.2d 160, 164 (Ga. 1968), aff’d, 396 U.S. 435 (1970). Bacon’s wife and daughters were given preceding life estates in the land; the trustees’ legal interest was a remainder interest. The trustees had the discretion to admit to the park “white men of the City of Macon, and white persons of other communities.” *Id.*


\(^{200}\) *See Abney*, 165 S.E.2d at 165. Ordinarily, the land would devolve upon the settlor’s residuary legatees, not his heirs. Indeed, Judge Posner, in summarizing the case, noted that the land passed to the residuary legatees. *See Posner, supra* note 28, at 508. In fact, however, the land passed to Bacon’s heirs-at-law pursuant to Georgia statute. *See Abney*, 165 S.E.2d at 163, 165. The Georgia court’s opinion strongly suggests, but does not expressly state, that the heirs and the residuary legatees were different persons. *See id.* at 162.
that decision against the charge that by decreeing a reversion to Bacon’s heirs, the state court had (a) prevented the petitioners from integrating the park, (b) “endorsed” Senator Bacon’s aversion to the establishment, with his funds, of an integrated park, and thereby (c) denied petitioners the equal protection of the laws. 201

It thus appears that the question of the permissibility of testamentary conditions can be approached as a purely normative one, and for the reasons already given, these conditions should never be enforced.

C. Conditions Restraining Marriage

It is somewhat difficult to catalog the results of the marriage-related cases in any meaningful or systematic way or to observe the emergence of any pattern of decision. The cases can, however, be divided with some legitimacy into three categories, and that categorization may be a helpful starting point. First are the cases dealing with bequests to a legatee who has never married, conditioned on the legatee’s remaining unmarried—so-called “general” (or “total”) restraints on first marriages. Second are general restraints on second marriages—for example, a bequest to the testator’s widow on the condition that she not remarry. And third, we find so-called “partial” restraints on marriage—for example, a bequest to Smith on the condition that Smith marry a Roman Catholic.

General restraints on first marriages often are invalidated on the ground that marriage is central to the preservation of family structure and hence of society and should not be restrained by conditional bequests. 202

[W]hat harm to society may be expected to result from the use of conditions and limitations in restraint of marriage? Immorality, de-population, the weakening of the family, and other consequent evils, it may be said. 203

Some states have mandated this result by statute. 204 Yet various courts allow the condition in instances where the testator did not intend to restrict the legatee’s marriage but had other purposes in mind, 205 a motive-based approach that is as unsatisfactory in this context as in the context of conditions encouraging divorce. 206 Other courts and statutes rely

201. See Abney, 396 U.S. at 445-46.
203. Browder, supra note 55, at 1327. The rule has been traced to Roman law and has been said to have resulted from the Romans' desire to force the growth (by striking down impediments to marriage) of a population depleted by the frequent Roman wars. See Commonwealth v. Staufer, 10 Pa. 350, 355 (1849).
204. See, e.g., CAL. CIV. CODE § 710 (West 1982); GA. CODE ANN. § 19-3-6 (1991); MONT. CODE ANN. § 70-1-404 (1997); N.D. CENT. CODE § 47-02-25 (1978).
206. See supra text accompanying notes 154-70.
on a hoary, technical distinction between limitations and conditions. If
the restriction is phrased as a limitation on the duration of ownership
("to A for as long as A remains unmarried; then to B"), the restriction is
valid, but if it is phrased as a condition subsequent requiring a forfeiture
("to A; but if A should ever marry, then to B"), the restriction is void.207
This distinction may serve as simply another way of differentiating be-
tween benignly and malignly intended restrictions: "[A] condition im-
ports an intention to restrain marriage while the use of a limitation evi-
dences only a desire to supply maintenance until marriage."208 Some
courts may use the distinction as a convenient device for reaching the de-
sired result, labeling a provision a limitation if they want to enforce it and
a condition if they want to invalidate it.209 Still other courts, however,
completely reject the condition-limitation distinction,210 as well they
should. The difference in wording is more likely to be fortuitous than re-

ductive of any real difference in testamentary intent, and if there does
exist a state policy against testamentary marital restraints, the condi-
tion-limitation distinction allows a clever or well-advised testator to frustrate
that policy by casting her restraint in the approved form of limitation.211
Consequently, "[c]ommentators have almost universally condemned the

207. See CAL. CIV. CODE § 710 (West 1982); MONT. CODE ANN. § 70-1-404 (1997); Bowman v.
Weer, 104 A.2d 620, 622 (Md. 1954); Winget v. Gay, 28 S.W.2d 999, 1000 (Mo. 1930); Harbin v. Judd, 340
S.W.2d 935, 937 (Tenn. Ct. App. 1960); see also Newton v. Wyatt, 188 N.E. 697 (Ind. App. 1934) (voiding
a condition against a widow's remarriage). Although an Indiana statute provides that "[a] devise to a
spouse with a condition in restraint of marriage shall stand, but the condition shall be void," IND. CODE
ANN. § 29-1-6-3 (Michie 1998), that language has been interpreted as voiding conditions against remar-
riage but permitting limitations on widowhood. See Harmon v. Brown, 58 Ind. 207, 210-11 (1877).


209. Indiana case law furnishes some good illustrations of the elasticity of the condition/limitation
distinction. An Indiana statute provides that "[a] devise to a spouse with a condition in restraint of mar-
riage shall stand, but the condition shall be void." IND. CODE ANN. § 29-1-6-3. In Thompson v. Patten, 123
N.E. 705 (Ind. App. 1917), a testator, in clause 1, bequeathed property to his wife as long as she remained
his widow—clearly a limitation. In clause 2, he provided that in the event she remarried, all his property
would go to his children—clearly a condition. See id. at 705. In spite of the unmistakable language of con-
dition in clause 2, the court seems to have emphasized the clause 1 language, for it treated the bequest as
a limitation and upheld it. See id. at 706. In Newton v. Wyatt, 188 N.E. 697 (Ind. App. 1934), a testator
bequeathed property to his wife for her natural life or so long as she remained a widow. The language
seems like the classic "limitation" language, but the court, noting that the will used the phrase "life or
widowhood," treated the restriction as a condition and invalidated it. See id. at 701.

210. See, e.g., In re Holbrook's Estate, 62 A. 368, 369 (Pa. 1905). The court's statement repudiating
the distinction should be characterized as dictum, inasmuch as the provision in the case was a limitation
and was indeed upheld as valid, as it would have been in courts honoring the condition-limitation distinc-
tion. See id. An English case questioned the limitation/condition distinction as early as 1855. See Potter v.
Richards, 24 L.J.K.B. 488, 489-90 (1855) ("I cannot myself see why there should be this distinction.").

211. The condition-limitation distinction cannot be approved insofar as it relates to the legality of
restraints of marriage. It is doubtful that it represents any difference in testamentary intention at all. If
the legal distinction is unknown to the testator, he is as likely to use one form of words as the other,
whether his intention be to restrain marriage or not. A more serious objection is that if he is aware of
the legal distinction, he will avoid the condition and use the limitation in order to escape the charge of
violating public policy. In such a manner any marriage-restraint doctrine can be effectively nullified. If
a condition in restraint of marriage is against public policy, a limitation of an estate until marriage is
against public policy also.

Id.
limitation-condition distinction and advocated similar treatment for all unlawful restrictions.\textsuperscript{212}

Testamentary restraints against remarriage—especially restraints imposed by a husband against a widow’s remarriage—have generally been approved.\textsuperscript{213} Some older cases upholding such conditions unblushingly view the matter as one of protecting the husband’s proprietary interest in his wife and progeny:

It would be extremely difficult to say, why a husband should not be at liberty to leave a homestead to his wife, without being compelled to let her share it with a successor to his bed, and to use it as a nest to hatch a brood of strangers to his blood.\textsuperscript{214}

Others view the matter as one of encouraging such modesty and restraint as becomes a widow, believing “widows are praiseworthy that content themselves with one husband, as being a pattern of chastity and modesty”\textsuperscript{215}—a view traceable to St. Augustine.\textsuperscript{216} A more modern court quite properly rejected this argument for upholding conditions against remarriage,\textsuperscript{217} but it upheld the condition nevertheless on the surprising ground that the institution of marriage has become so debased that its encouragement no longer represents a sufficiently strong policy to counterbalance the policy of effectuating a settlor’s intent.\textsuperscript{218}

When considering partial restraints on marriage, courts often, though not consistently, direct their attention not to the arbitrariness of a restraint’s content but to the extent of its reach. If a will conditions a bequest on the legatee’s marrying a certain kind of person, and if the number of “qualifying” potential spouses in the legatee’s geographic area is so small that it would be difficult if not impossible for the legatee to secure such a spouse, the condition will be held void because, in operation, it amounts to a virtual prohibition of marriage. But if the number of


\textsuperscript{214} Commonwealth v. Stauffer, 10 Pa. 350, 355 (1849).

\textsuperscript{215} Duney v. Schoeffler, 24 Mo. 170, 173 (1857).

\textsuperscript{216} See Saint Augustine, \textit{The Excellence of Widowhood, in Treatise on Various Subjects} 267, 294 (Sister Mary Sarah Muldowony et al., trans., The Fathers of the Church No. 16, 1952) (“[F]irst marriages have greater merit than second.”); see also 1 Corinthians 7:39-40 (“A woman is bound [by the law of marriage] as long as her husband is alive, but if her husband dies, she is free to remarry. . . . But she will be more blessed, in my judgment, if she remains as she is [i.e., a widow].”)

\textsuperscript{217} See In re Lewis Trust, 652 P.2d 1106, 1108 (Colo. Ct. App. 1982) (“Remarriage is no longer considered unchaste, immodest, or unfaithful, and archaic principles of coverture have been abandoned.”).

\textsuperscript{218} See id. at 1108.
qualifying potential spouses is high enough, the condition will be upheld as a reasonable partial restraint.\(^{219}\)

A classic application of this rule is to be found in Maddox v. Maddox's Administrator,\(^{220}\) where the testator, a member of the Society of Friends (Quakers), bequeathed to his niece Ann a remainder interest in some personal property, subject to the condition that she remain unmarried or marry another Quaker. The court invalidated the condition, noting

that when [Ann] became marriageable, the number of Quakers in the county . . . in which she resided, and the vicinity, was small, and that it had been since diminishing. There were not within the circle of her association, more than five or six marriageable male members of the society, according to one of the witnesses, or three or four, according to another; and the probability is, as stated by one of the witnesses, the restriction imposed by the condition would have operated a virtual prohibition of her marrying. To say there were members of the society residing in other counties, is no answer to the objection. She certainly could not be expected . . . to go abroad in search of a helpmate; and to subject her to the doubtful chance of being sought in marriage by a stranger, would operate a restraint upon it far more stringent than those which are repudiated in the cases and illustrations which I have already cited.\(^{221}\)

This numbers-based approach to the problem is entirely—I might almost say astonishingly—unsatisfactory. First of all, the approach seems unprincipled in that its results turn on the fortuities of geographic and

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219. See 1A Scott on Trusts, supra note 34, § 62.6.
A partial restraint should be illegal when, in operation under the particular circumstances, it approaches the character of a general restraint. Thus a condition that a beneficiary not marry a red-haired person would in a sense be unreasonable. Certainly it would be arbitrary. But it should not be held to restrain marriage unreasonably. If, on the other hand, a condition required that the beneficiary should marry a red-haired person and none other, it would seem to be an unreasonable partial restraint.

Browder, supra note 55, at 1331; see also Ga. Code Ann. § 19-3-6 (1991). The Georgia code provides the following:

Marriage is encouraged by law. Every effort to restrain or discourage marriage by contract, condition, limitation, or otherwise shall be invalid and void, provided that prohibitions against marriage to a particular person or persons or before a certain reasonable age or other prudential provisions looking only to the interest of the person to be benefited and not in general restraint of marriage will be allowed and held valid.

Id.

The Restatement of Property (Donative Transfers) states that the determinative question is whether the kind of “marriage permitted by the restraint is . . . likely to occur.” RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 6.2 cmt. a (1983). This seems potentially to be a somewhat different rule, especially because the Restatement says that “likelihood” is to be determined not according to some objective standard but rather according to “the circumstances of the particular case.” Id. Thus, if a will conditioned a bequest on a gay male legatee’s marrying “a woman with ten toes,” the Restatement rule would seem to regard the condition as void on the ground that such a marriage would not likely occur. Courts, however, would likely uphold the condition on the ground that there are plenty of ten-toed women about, even though this particular legatee might balk at marrying one. See supra note 148.

220. 52 Va. (1 Gratt.) 804 (1854).
221. Id. at 809.
demographic factors. By this reasoning, a bequest conditioned on the legatee's marrying a Jewish person stands more likely to be upheld in New York than in Wyoming, and a bequest conditioned on the legatee's marrying a Christian probably could withstand attack everywhere in the country, while a bequest conditioned on the legatee's marrying a Taoist probably could not survive anywhere.

Second, as a practical matter courts cannot easily craft standards to determine the extent to which a partial restraint effectively amounts to a general restraint. The difficulty in creating standards may explain why, although it is easy enough to find courts willing at least to pay lip service to this distinction between reasonable and unreasonable partial restraints, it is hard to find courts that actually find a partial restraint to be unreasonable. Indeed, the most recent American case striking down such a condition was the 1939 case of In re Liberman, although religion was only a tangential factor in the case. Religion was front and center, however, in a 1967 case, In re Estate of Keffalas, which upheld a condition requiring each of the testator's three eldest sons to marry women "of true Greek blood and descent and of Orthodox religion," although the number of marriageable persons of Greek descent and Orthodox religion in Butler County, Pennsylvania, may not have been proportionately more than the number of Quakers found so inadequate in the Maddox case. In point of fact, the court made no inquiry as to the number of

222. It has been estimated that the Jewish population of New York State in 1996 represented about 9.1% of the state's total; that of Wyoming, less than 0.1%. See U.S. DEPT OF COMMERCE, THE STATISTICAL ABSTRACT OF THE UNITED STATES 1998, at 28, 72.


224. 18 N.E.2d 658 (N.Y. 1939).

225. The testator's will provided that one of his sons could not share in the income of a trust unless and until he married with the consent of the testator's other two children. The testator's purpose was to restrain the son from marrying a non-Jewish woman, but the will authorized the other two children to withhold their consent for any reason. See Liberman, 18 N.E.2d at 660-61. The court struck down the condition as an unreasonable restraint on marriage but only because the consent power was vested in persons who would suffer financially if they consented (the other two children were likewise income beneficiaries, but their interest would cease and be transferred to the son if they consented to his marriage). See id. at 661. Thus, the court viewed the will as conditioning the son's bequest on his making an impossible marriage (a marriage with the consent of persons who were likely to withhold their consent), so it invalidated the condition. See id. at 661-62.

226. 233 A.2d 248 (Pa. 1967). The court upheld the condition in the case of the unmarried sons. Where a similar condition was imposed on the same testator's married children, the court struck down the condition on the ground that, inasmuch as the married children were not married to persons of Greek descent and Orthodox religion, the condition operated as an inducement to divorce. See id. at 250.

227. How many potential marriage partners were available to the legatees in Keffalas? The population of Butler County in 1990 was 152,013, and the 1990 population of the entire state of Pennsylvania was 11,881,643. See THE WORLD ALMANAC AND BOOK OF FACTS 361, 417 (Robert F. Sabato ed., 1994). Pennsylvania's population in 1960 was 11,319,366, see id. at 361, so, assuming the county's proportionate share of the state's population has remained constant, the 1960 population of Butler County should have been approximately 144,819. The Greek Orthodox Archdiocese of North and South America reported that it had 1,950,000 members. See U.S. DEPT OF COMMERCE, supra note 222, at 71. Pennsylvania's 1990 population of 11,881,643 represents about 4.78% of the population of the country. If we assume that members of the Greek Orthodox Archdiocese are evenly distributed throughout the country (doubtful) and assume that the 1,950,000 reported membership in the Archdiocese comprises only U.S. residents
qualifying potential spouses, for it was of the singular opinion that inasmuch as the condition implicated "only" the choice of a spouse (only?!), no rule of public policy forbade the condition's enforcement.228

The third reason for rejecting this approach to determining which partial restraints should be upheld is that it completely misses the point; it overlooks what makes these conditions so divisive and inappropriate. A bequest conditioned on the legatee's marrying a non-Catholic leaves the legatee with a large number of qualifying, non-Catholic potential mates; thus the condition would be—and in fact has been—upheld under the stated rule,229 despite the repugnance of the condition under the analysis I have offered. Indeed, even if under a testamentary condition the class of permissible spouses includes all human beings except one, the condition should be held invalid.230 Again, 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.

III. CONSEQUENCES OF INVALIDATING A TESTAMENTARY CONDITION

Suppose a testator devises Blackacre "to A; but if A should ever marry, then to B," and she devises the residue of her estate to C. Invalidating the condition attached to the devise of Blackacre leaves us with the question of determining the proper recipient of Blackacre. Do we grant Blackacre to A absolutely, so that even if A later marries, A keeps Blackacre? Do we grant Blackacre to B, so that even if A never marries, B and not A possesses the property? Do we hold that the disposition of Blackacre is so thoroughly tainted by the void condition that the devise fails entirely and Blackacre becomes part of C's residue? American

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(even more doubtful, in view of the reference to North and South America in the reporting organization's name), then 93,210 members of the Greek Orthodox church lived in Pennsylvania in 1990, and 1193 members lived in Butler County. Because Pennsylvania's 1960 population was only 95.3% of its 1990 population, we can estimate that 1137 members of the church lived in Butler County in 1960. In addition, only half were female—569 members. There were three brothers, each of whom had to find Greek Orthodox wives—189.67 members per brother. If we consider only members of at least 18 years of age (i.e., of marriageable age), the number is down to 144 candidates per brother. See id. at 33. As to how many of those 144 were unmarried and of "true Greek blood and descent" and of suitable age and temperament, one can only speculate, but it looks as though each brother would have had slim pickings. The Maddox court was willing to consider not only the number of eligible partners in the same county as the legatee but also the number of eligible partners in the "vicinity." See Maddox, 52 Va. at 809. People are more mobile now than they were then, so perhaps it would be a good idea to consider as potential mates for the brothers the Greek Orthodox members in the nearby city of Pittsburgh. Or here is an even better idea: refusing to engage in such asinine counting to determine whether to enforce a testamentary condition.

228. See Estate of Kefalas, 233 A.2d at 250 (quoting In re Clayton's Estate, 13 Pa. D. & C. 413 (1929), aff'd, 153 A. 742 (Pa. 1931)).

229. See, e.g., United States Nat'l Bank v. Snodgrass, 275 P.2d 860, 868 (Or. 1954) (stating that the marriage was not one of complete restraint because it applied to the legatee's marriage only until she reached the age of 32; thereafter, she could marry anyone she wished without forfeiting the bequest).

230. See Taylor v. Rapp, 124 S.E.2d 271, 271 (Ga. 1962) (upholding a testamentary provision purporting to disinherit the testator's elder daughter if she married "Jody Taylor, a boy I do not like"). The daughter did indeed marry Jody and found herself disinherit. See id. at 273.
courts never have been drawn to this third solution, which seems like a penalty designed to discourage future testators from conditioning their bounties on a legatee’s celibacy. Penalties are out of place in the field of will construction, where the goal is to execute the testator’s intentions except insofar as those intentions are directed to improper ends. The testator clearly intended Blackacre to go to either A or B, rather than to C, and inasmuch as the testator’s preference for A or B over C reflects no improper design, the correct solution is to give Blackacre to either A or B. But which one of them? More generally, when a testamentary condition is held invalid, how is the property subject to the condition to be distributed? Unfortunately, the matter is by no means settled.

Traditional analysis has always distinguished between invalid conditions subsequent and invalid conditions precedent. When a condition subsequent is held invalid, the authorities agree that the condition is to be ignored, and the interest subject to the condition—that is, the interest that would have been divested had the condition been valid and been breached—becomes absolute. Thus, in the introductory illustration of this section, which involved a condition subsequent, A’s interest in Blackacre would be absolute; it would not be divested by his later marriage. What makes this result the proper one, however, is not the interior logic of the testator’s language but rather the testator’s intent. We give A an absolute interest in Blackacre not because the testamentary text commences by granting A an absolute interest and only later stipulates an improper divesting condition but rather because we infer that the testator’s primary purpose was to benefit A; the testator would rather have Blackacre pass to A, even if A did marry, than have it pass to B, even if A did not marry. The testator’s intent is the touchstone. Public policy is not offended if a court awards Blackacre to A; it is offended if the court awards Blackacre to A because A has remained single. Similarly, it would not be against public policy to award Blackacre to B, so long as the property is not awarded to B because A married.

This traditional rule that renders absolute any testamentary gift subject to a void condition subsequent is a sensible constructional preference, to be employed where no other evidence of the testator’s intent exists, but it cannot be defended as an unalterable rule. If a testator bequeath Whiteacre “to my ex-husband, Henry; but if he ever files a nonfraudulent income tax return, then to my child, Charlie,” the tradi-

231. See Browder, supra note 55, at 1335.
232. “A condition precedent states that performance is to precede the vesting of an estate; a condition subsequent states that nonperformance will determine [i.e., divest or terminate] an estate antecedently vested.” Thomas Jarman, A Treatise on Wills 509 (5th ed. 1881).
233. See id.; 1A Scott on Trusts, supra note 34, § 652; see also, e.g., In re Lewis Trust, 652 P.2d 1106, 1108 (Colo. Ct. App. 1982) (dictum); In re Forte’s Will, 267 N.Y.S. 603, 611 (Sur. Ct. 1933); Estate of Keffalas, 233 A.2d at 251.
234. See 6 American Law of Property, supra note 21, at 685 (“[T]he making of a present gift subject to defeasance by non-compliance with a condition subsequent tends to indicate an intention that the gift may be enjoyed free of the condition if public policy prevents the condition’s enforcement.”).
tional rule would award Whiteacre to Henry absolutely, even though the proper inference would be that the testator intended the illegally conditioned bequest merely as a posthumous taunt and that her fundamental goal was to benefit her child. Few courts, however, have been willing to treat as a mere canon of construction the doctrine that a gift subject to a void condition subsequent should be made absolute; most apply it as an unquestionable rule.235

The more vexing problem of illegal conditions precedent has resisted attempts at definitive resolution. Professor Scott, though noting the lack of widespread agreement among the cases and authorities, states that “the modern tendency” in cases involving void testamentary conditions precedent is to engage in the very sort of search for the testator’s intent that I recommended for void conditions subsequent.236 This approach was applied to good effect in In re Gerbing’s Estate.237 The testator had bequeathed property in trust, with the income to be paid to her son, Frank. If Frank divorced his wife, Arlie, and remained divorced for two years, the trust was to terminate, and all corpus and accumulated income was to be distributed to him. But if he was still married to Arlie at his death, the corpus and accumulated income would be distributed to the testator’s sister, Katherine. The court held the condition void— that is, the condition precedent to Frank’s obtaining an absolute interest in the trust property — and then addressed the question whether the voiding of the condition meant that (1) Frank was immediately entitled to the trust property outright, or (2) Frank’s interest in the corpus failed altogether.238 After examining the other portions of the testator’s will in which she showed an interest in Frank’s welfare by making other bequests in his favor and showed confidence in his judgment by naming him as co-executor and granting him the authority to name successor trustees, the court concluded that the testator’s primary purpose was to benefit Frank. She would have preferred him, rather than Katherine, to receive the trust property even if that meant giving him the property while he was still married to Arlie.239

In cases involving bequests subject to a void condition precedent, what constructional preference is to be indulged where no evidence exists of the testator’s particular intent? Professor Scott states that the

235. In In re Estate of Gerbing, 337 N.E.2d 29 (Ill. 1975), the court rejected the distinction between void conditions subsequent and void conditions precedent and stated that in both cases the proper analysis was to ascertain the testator’s intent. See id. at 34. Unfortunately, the statement, as applied to conditions subsequent, should be regarded as dictum inasmuch as the case involved a condition precedent. See id.

236. See 1A Scott on Trusts, supra note 34, § 65.3.

237. 337 N.E.2d 29 (Ill. 1975).

238. See id. at 33-34.

239. Had the court adopted this latter position, Frank’s income interest would have remained intact, but on his death the corpus would have passed to Katherine whether or not Frank was still married to Arlie. See id. at 34-35.

240. See id. at 35.
normal inference is that the testator would prefer the gift to be made absolute rather than fail altogether.\textsuperscript{241} Professor Browder, however, believes that the normal inference is that the testator would prefer the gift to fail.\textsuperscript{242} Professor Scott's view of what is normal seems to have more supporters, and indeed, some statutes and cases have hardened Scott's normal inference into a blanket rule.\textsuperscript{243} But even a mere "normal inference" becomes difficult to apply when conditions precedent are expressly imposed in the alternative. Suppose a testator devises Blackacre "to A for life, remainder to B if B has divorced his wife by the date of A's death; if B has not divorced his wife by the date of A's death, then on A's death Blackacre is to pass to C." The determinative question is whether the testator would rather have Blackacre pass (1) to B, even if B is still married, or (2) to C, even if B has divorced his wife. Aside from the fact that the testator mentioned B before C, there would seem to be no basis for presuming that she would prefer B to C in all events.

Some have argued that when faced with a testamentary condition that violates public policy, a court, rather than striking down the condition altogether, should endeavor to modify the condition so as to bring it within acceptable limits and yet keep it as close as possible to what the testator actually intended, a response similar to the judicial exercise of a cy pres power in the context of charitable trusts.\textsuperscript{244} Although, in theory, cy pres represents a helpful and flexible response to illegal conditions,\textsuperscript{245} in operation the doctrine is likely to yield no solution at all, for there may be no legitimate intermediate position between enforcing the condition as is and abrogating the condition altogether. Suppose a testator conditions a bequest to his daughter on her marrying a Protestant. If the con-

\textsuperscript{241} See 1A Scott on Trusts, supra note 34, § 65.3, cited in In re Estate of Agnew, 174 N.Y.S.2d 1008, 1011-12 (Sur. Ct. 1957); see also Restatement (Third) of Trusts § 29 cmt. d (1998).

\textsuperscript{242} See Browder, supra note 55, at 1335; Roscoe Pound, Legacies on Impossible or Illegal Conditions Precedent, 3 Ill. L. Rev. 1, 3 (1908). Such a constructional preference would generate perverse incentives, inasmuch as the grantee of the gift over would be inclined to challenge the validity of a condition with which the grantee actually subject to the condition might be happy to comply. See Estate of Gerbing, for example, Katherine would be prompted to challenge the validity of the divorce condition even though Frank, whose divorce was the subject of the condition, might be quite prepared—even eager—to divorce his wife to obtain the trust property. See supra text accompanying notes 237-40.

\textsuperscript{243} See, e.g., Ind. Code Ann. § 29-1-6-3 (Michie 1998); Graves v. First Nat'l Bank, 138 N.W.2d 584, 592 (N.D. 1965); In re Estate of Kefalas, 233 A.2d 248, 251 (Pa. 1967).

\textsuperscript{244} See Restatement (Third) of Trusts § 29 cmt. e (1998); Posner, supra note 28, at 512.

The phrase "cy pres" comes (but with the old Norman spelling) from the French "si près que possible," meaning "as close as possible." See Black's Law Dictionary 387 (6th ed. 1990). Professor Scott explains the doctrine as follows:

Where property is given in trust for a particular charitable purpose, and it is impossible or impracticable to carry out that purpose, the trust does not fail if the testator has a more general intention to devote the property to charitable purposes. In such a case the property will be applied under the direction of the court to some charitable purpose falling within the general intention of the testator.

\textsuperscript{4A Scott on Trusts, supra note 34, at 389-90.}

\textsuperscript{245} Courts sometimes employ the cy pres doctrine to save a disposition that otherwise would violate the Rule Against Perpetuities. See, e.g., In re Estate of Chun Quan Yee Hop, 469 P.2d 183, 186 (Haw. 1970) (reducing a period in gross of 30 years down to 21 years to bring the terms of a testamentary trust into compliance with the Rule).
diction is held to be void in its present form, how can it be modified to make it acceptable? Changing "Protestant" to "Christian" would make the condition numerically easier to satisfy but would hardly address the public policy objection to the condition in its original form.

Even English courts, invested with considerably more authority than American courts to modify the terms of trusts,246 have found the complete abrogation of the condition to be the better solution. The English Variation of Trusts Act, 1958,247 grants a court in chancery an essentially unlimited—indeed, revolutionary248—power to authorize a complete alteration of the dispositive terms of a trust. If the identifiable adult beneficiaries consent to the alteration, the court can consent to it on behalf of all the infant, unborn, or unascertained beneficiaries, "provided that . . . the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person."

The notion is not that the court amends the trust; rather, the notion is that the beneficiaries have, by unanimous consent, agreed to an amendment of the trust, with the court supplying the necessary but missing consent of the infant, unborn, or unascertained beneficiaries. There is no limit to the kind of alterations that can be agreed to in this manner and no need to cite "unforeseen changes in circumstances" or to argue that a failure to alter the trust would substantially impair the purposes of the trust:

If all the beneficiaries under the settlement had been sui juris, they could . . . have joined together . . . and declared different trusts which would supersede those originally contained in the settlement. Those new trusts would operate proprio vigore, by virtue of a self-contained instrument—namely, the deed of arrangement or variation. The original settlement would have lost any force or relevance. The effect of an order made under the Variation of Trusts Act, 1958, is to make good by act of the court any want of capacity to enter into a binding arrangement of any beneficiary not capable of binding himself and of any beneficiary unborn: the nature and effect of any arrangement so sanctioned is the same as that I have described.250

The statute, which has been invoked thousands of times since its enactment,251 does not authorize a court to consent on behalf of beneficiar-
ies who are sui juris and ascertained, even if their interests are remote and even if they are numerous or unreachable. If any ascertained adult beneficiary refuses to consent, the proposed change cannot be made.

Of particular interest is *Remnant's Settlement Trusts*. The testator bequeathed the residue of his estate in two trusts: five-eighths of the residue for the benefit of his daughter Dawn and three-eighths for the benefit of his daughter Merrial. Each trust was to pay the designated daughter the income for life; thereafter, the income and principal were to be held for the benefit of that daughter's children. The court's opinion is not clear as to the terms on which the income and principal were to be held for those children. It appears that no child surviving the daughter was to receive an outright share prior to his attaining the age of thirty. However, if at the death of the daughter, any of her children should be "practising Roman Catholicism," such child should forfeit his share. As to where the forfeited share should go, again the opinion is not clear. It appears that the forfeited share would go to that child's siblings, but if all the siblings were Catholics, then to the children of the other daughter, and if the other daughter's children were all Catholics, too, then to a "default trust . . . in favor of" the children of the testator's nephew and niece.

All of Dawn's children were non-Catholics within the meaning of the testator's will. Merrial and Merrial's youngest child were Catholic; Merrial's other two children, though baptized Protestant, attended a Catholic church. Dawn's children and Merrial's children were minors. All the adult beneficiaries (Dawn, Merrial, and the contingent beneficiaries, the testator's nephew and niece) wanted to jettison the forfeiture provisions. The arrangement they proposed was:

- that out of [Dawn's share, which amounted to some £39,000], the sum of approximately £10,000 shall be set aside on accelerated

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252. *In Knocker v. Youle*, [1986] 2 All E.R. 914 (Ch.), the court refused to apply the 1958 Act because the consent of the adult takers in default of appointment (they lived in Australia) had not been obtained, and the 1958 Act did not authorize the court to consent on behalf of ascertained adults who currently had interests under the trusts, even if those interests were contingent future interests. See *id.* at 914.

253. [1970] 2 All E.R. 554 (Ch.). The case is discussed briefly in Jones, *supra* note 169, at 125. Professor Jones does not identify the case by name, but I believe it is the *Remnant* case to which he refers.

254. The testator took pains to define what constituted practicing Roman Catholicism: "(a) Bel[ing] a member of the Roman Catholic Faith or (b) Hav[ing] attended a Roman Catholic Church for worship at least once within the previous year or (c) Be[ing] married to or living as man and wife with a member of the Roman Catholic Faith." *Remnant's Settlement Trusts*, [1970] 2 All E.R. at 556.

English animosity toward Roman Catholics has a long history. Although the era of the early Stuarts provides gruesome examples (the tortures meted out to the suspected Gunpowder Plotters), the era of the later Stuarts offers a milder one involving Nell Gwyn, one of the mistresses of Charles II. When an angry, anti-Catholic mob, mistaking her for the King's French mistress Louise de Keroualle (Duchess of Portsmouth), surrounded Nell's carriage with a view to barring it from entering the king's residence, the irrepressible Nell, showing extraordinary presence of mind, successfully calmed the storm by exclaiming, "Pray, good people, desist. I am the Protestant whore!" Audrey Woods, *Peek Over Royal Transom Finds Truly Lurid Past Misbehaviors*, L.A. TIMES, July 19, 1992, at 6; see also Chris Partridge, *Des Res*, DAILY TELEGRAPH (London), Oct. 8, 1994, at 27.

trusts for her children. Equally, out of [Merrial’s share, which amounted to some £23,000], the sum of approximately £10,000 shall be set aside on accelerated trusts for her children. Finally, the sum of £1,000 shall be contributed equally by [Dawn and Merrial] to be set aside for the benefit of the children of [the testator’s nephew and niece].

For the arrangement to be effective, however, the court had to consent on behalf of Dawn’s minor children, Merrial’s minor children, and the minor children of the testator’s nephew and niece. To give such consent, the court had to be satisfied, according to the 1958 Act, “that the carrying out of the arrangement is for the benefit of every person on whose behalf the court is concerned to approve the arrangement, and secondly, having so satisfied itself must further be satisfied that the arrangement is in its nature a fair and proper one.”

The most interesting part of the court’s opinion deals with what it termed “[t]he real difficulty.” Specifically, could the court properly consent to the arrangement on behalf of Dawn’s children? Because they all were Protestants, they stood to gain by the enforcement of the forfeiture provisions, inasmuch as upon Merrial’s death, her children all being Catholic, Merrial’s share would pass to them. How could it be argued that the proposed arrangement, which removed the forfeiture provision, benefited Dawn’s Protestant children? First of all, the court noted that the arrangement gave Dawn’s children an accelerated interest in £10,000. And second, the court cited two nonfinancial considerations. The forfeiture provision operated as a deterrent to each of Dawn’s children in the selection of a husband (they forfeited their interests if they married Catholics), and “the forfeiture provisions represent[ed] a source of possible family dissension.” Therefore, the court held:

It remains to consider whether the arrangement is a fair and proper one. As far as I can see, there is no reason for saying otherwise, except that the arrangement defeats this testator’s intention. That is a serious but by no means conclusive consideration. I have reached the clear conclusion that these forfeiture provisions are undesirable in themselves in the circumstances of this case and that an arrangement involving their deletion is a fair and proper one. I propose accordingly to approve the arrangement with one or two modifications which are not material to this judgment.

256. Id.
257. Id. at 558.
258. Id.
259. Id. at 559.
260. Id.
IV. CONCLUSION

Testamentary conditions calculated to restrain legatees' personal conduct should not be enforced. We allow testation only to the extent necessary to avoid the harms that the abolition of testation would produce. To avoid those harms it is crucial to allow property owners to designate their successors, but it is not necessary to allow them also to superintend their successors' behavior. Consequently, although a property owner may enlist society's aid to the extent necessary to convey her property to her successors, she may not properly enlist society's aid in governing their conduct.

Although this argument has been advanced only in the context of testamentary conditions affecting conjugal or religious choices, it must be admitted that no limiting principle has been offered by means of which this argument can be so confined. The minimalist testation theory would invalidate all testamentary conditions calculated to restrain or induce particular personal conduct on the part of the legatees, even if the conduct in question has nothing to do with marriage or religion and even if the conduct sought to be induced is "good" or the conduct sought to be restrained is "bad."

Let me test the theory's limits by considering perhaps the most benign condition imaginable: a case in which, although the condition is calculated to induce personal conduct, the conduct seems intuitively most worthy of encouragement. Suppose a testator establishes a trust in which the trustee is directed to distribute to each child of the testator each month an amount equal to twice the amount the child contributed to charity in cash during the month. Had the will specified a distribution of merely one hundred percent of the child's charitable cash contribution, the provision would simply create in the child a valid special power of appointment. But because the will prescribes a distribution of two hundred percent (or, in any event, more than a hundred percent), the will represents an attempt to induce the child to make charitable donations and should be invalidated. If the testator wishes to encourage her children to take an interest in charity and select the organizations that are to receive the family bounty, she can establish a charitable trust of which her children are trustees (and from which they can draw compensation). But if the testator desires to entice her children to write checks to charity as a mechanism for fixing or enlarging their shares of her estate, that is not a goal that the law of wills should support. The condition should not be enforced.

261. This hypothetical is not the product of my fevered brain. A suggested trust provision along similar lines is endorsed in Paul A. Meints, Value-Based Estate Planning: Using Trusts to Promote and Reward Behavior, 87 ILL. B.J. 138, 138 (1999).
262. Compare this solution with the discussion of support trusts supra text accompanying note 172.
263. A child of the testator who wishes to increase his net worth has only to start writing checks. Contributing $50,000 to charity begets a $100,000 transfer from the testator's estate, a transfer that in-
Having relied on William Shakespeare to introduce the problem, I shall employ Sean O'Casey to epitomize the solution. In O'Casey's 1924 play *Juno and the Paycock*,265 "Juno" Boyle and her husband and guests, much in need of cheer, put a record on the Boyles' newly acquired gramophone. In the midst of these modest revels, "Needle" Nugent, a sententious tailor dressed primly in funereal black, bursts uninvited into the Boyles' living room and shouts over the sound of their music, reproaching all present for indecorously playing a gramophone while a funeral procession is passing in front of the house: "Have none of yous any respect for the Irish people's National regard for the dead?" Unmoved, Juno replies, "Maybe, Needle Nugent, it's nearly time we had a little less respect for the dead, an' a little more regard for the livin'."266

264. This testamentary scheme might benefit from the judicial exercise of a cy pres power to reduce the 200% to 100%. See supra text accompanying note 244.
266. Id. at 49.