THE GOVERNMENTAL STAKE IN PRIVATE WEALTH TRANSFER

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Wealth transfer law reform in the United States has been almost singularly dominated by principles of donative autonomy and dispositional freedom. In its unhesitating pursuit of donor preference facilitation, however, wealth transfer law has overlooked important governmental interests in the regulation of gratuitous transfers.

This Article proposes a novel unifying theory for regulating gifts, wills, and trusts by arguing that the law should better account for three aspects of the governmental stake in private wealth transfer: (1) the enforcement of criminal and civil laws, (2) the conservation and allocation of public financial resources, and (3) efficiency in the administration of justice. In light of these sovereignty principles, this Article then examines four contexts of wealth transfer law that exhibit missing or misplaced mandates that undermine governmental interests and, in some instances, donor preferences as well: (1) the permissible scope of trust privacy, (2) enforceability of disclaimers subject to government liens, (3) mandates imposing reformation and the admissibility of extrinsic evidence, and

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(4) the unenforceability of no contest and arbitration clauses. In each context, this Article proposes reforms to enhance doctrinal coherence and strike a more careful balance between governmental interests and individual autonomy.

INTRODUCTION

The central policy of wealth transfer law is one of abiding deference to private ordering and donative choice.[1] With sparingly few exceptions, wealth transfer law governs by default rules and the freedom of disposition grants donors sweeping autonomy to dictate the terms of a gift.[2] Mandatory restrictions on dispositional freedom are minimal and mostly confined to transfers that generate contexts where regulation is necessary to minimize spillover costs or harm to private, non-consenting third parties.[3] However, in a fundamental and unexplored tension between private and governmental interests, the law has reserved for the *government* a notably muted role in regulating private wealth

[1] *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. a (AM. LAW INST. 2003) ("The organizing principle of the American law of donative transfers is freedom of disposition.").

[2] *See infra* Part I (describing freedom of disposition).

[3] *See, e.g.*, Adam J. Hirsch, *Freedom of Testation / Freedom of Contract*, 95 MINN. L. REV. 2180, 2204 (2011) ("[E]conomic analysis—applicable both to freedom of contract and freedom of testation—potentially justifies nullification only of conditions that involve irreversible choices or that entail tangible spillover costs."); David Horton, *Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism*, 58 B.C. L. REV. 539, 573 (2017) (noting that "[i]n the fields of contracts and property, courts and lawmakers sometimes refuse to honor transfers between competent and consenting individuals in order to protect the interests of other parties"); John H. Langbein, Essay, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1107 (2004) (citing mandatory trust law rule that trust be for benefit of beneficiaries). The most prominent restraints on the freedom of disposition include the venerable doctrines of the Rule Against Perpetuities, *see, e.g.*, Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1304 (2003) (noting "hardiness" which Rule Against Perpetuities has shown until recently); Robert H. Sitkoff & Max Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 359 (2005) (discussing "erosion" of Rule Against Perpetuities in certain states and resulting validation of perpetual trusts), the prohibition on spousal disinheritance, *see, e.g.*, Lawrence W. Waggoner, *The Uniform Probate Code's Elective Share: Time for a Reassessment*, 37 U. MICH. J.L. REFORM 1, 1-4 (2003) ("The elective share is the statutory provision common to most probate codes in non-community property states that protect a decedent's surviving spouse against disinheritance."), and the invalidity of self-settled spendthrift trusts. *See, e.g.*, Ronald J. Mann, *A Fresh Look at State Asset Protection Trust Statutes*, 67 VAND. L. REV. 1741, 1744 (2014) ("The traditional rule . . . has been that an asset-protection (or self-settled) trust is not effective to transfer assets out of the reach of creditors."); Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1043-44 (2000) (citing entrenched rule that "spendthrift provision for the settlor's own benefit is unenforceable" and discussing rationale for rule).

transmission.[4] This Article argues that wealth transfer law reforms lack a unifying principle to protect important governmental interests in (1) the enforcement of criminal and civil laws; (2) the allocation and conservation of public financial resources; and (3) efficiency in the administration of justice, among a host of other potentially sovereign interests.

To orient our thinking about the governmental stake in private wealth transfer, let us begin with a concrete, timely, and superlative illustration: President Donald J. Trump has been assailed by ethics watchdogs since the start of his presidential campaign for failing to address the innumerable conflicts of interest between his decision-making authority as head of state and his continued control of a sprawling but opaque family business.[5] Among the many potential conflicts are President Trump's business dealings with the U.S. government and foreign sovereigns in his personal capacity—transactions in which he may be tempted to favor his own private interests when making official decisions on the government's behalf.[6]

One widely reported conflict involves President Trump's stake in the Trump International Hotel in Washington, D.C., located in a historic decommissioned post office owned by the federal government.[7] Several interrelated Trump

[4] For recent theoretical scholarship on mandatory dispositional restraints, see Felix B. Chang, *Asymmetries in the Generation and Transmission of Wealth*, OHIO ST. L.J. (forthcoming 2018) (manuscript at 5) (on file with author) (proposing redistribution function for non-tax wealth transfer rules); Mark Glover, *A Social Welfare Theory of Inheritance Regulation*, UTAH L. REV. (forthcoming 2018) (manuscript at 4, 39) (on file with author) (articulating social welfare theory of regulation and recommending heightened regulatory constraints on disinheritance of minor children and relaxation of slayer inheritance bar); Adam J. Hirsch, *Formalizing Gratuitous and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797, 799-800 (2014) (recommending greater synthesis between mandatory restrictions on freedoms of testation and contract, and applying that theory to forbidden conditions, forbidden bequests, compulsory bequests, and future interests); Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1170-80 (2013) (proposing theory of testamentary restriction distinguishing between ex ante and ex post justifications and applying that theory to conditional bequests, incentive trusts, destruction of property at death, and trust modification and termination).

[5] *See, e.g.*, Eric Lipton & Susanne Craig, *Trump's Far-Flung Holdings Raise High Risk for Conflicts*, N.Y. TIMES, Nov. 15, 2016, at A1 ("The layers of potential conflicts he faces are in many ways as complex as his far-flung business empire, adding a heightened degree of difficulty for Mr. Trump . . . ."); Nicholas Fandos, *U.S. Government Ethics Chief Resigns, Casting Uncertainty Over Agency*, N.Y. TIMES (July 6, 2017), https://www.nytimes.com/2017/07/06/us/politics/walter-shaub-office-of-government-ethics-resign.html (discussing resignation of government's top ethics watchdog due to clashes with Trump Administration).

[6] *See* Fandos, *supra* note 5 (citing, for example, President Trump's decision not to liquidate assets as generating appearance that personal businesses were profiting from position).

[7] *See* Lipton & Craig, *supra* note 5, at A1 ("The Trump International operates out of the Old Post Office Building, which the federal government owns. That means Mr. Trump will

entities, including multiple revocable trusts established for the benefit of President Trump and his adult children,[8] lease the hotel premises from the U.S. government under the supervision of the federal General Services Administration ("GSA").[9] The GSA lease expressly prohibits any elected official from being "admitted" to share in the lease or receive any benefit therefrom.[10] Presumably, this requirement would disqualify President Trump's own continued participation in the lease because he is now an elected official. Additionally, because the hotel does business with foreign governments,[11] President Trump's involvement may also violate the anti-corruption mandate of the Emoluments Clause of the Constitution.[12]

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be appointing the head of the General Services Administration, which manages the property, while his children will be running [the] hotel . . . .").

[8] The government has publicly identified the following entities and trusts as having an ownership interest in the lease: Don OPO LLC, DJT Holdings LLC, DJT Holdings Managing Member LLC, Donald J. Trump Revocable Trust, Donald J. Trump, Jr. Revocable Trust, Eric OPO LLC, Eric Trump Revocable Trust, Ivanka OPO LLC, Ivanka OPO Hotel Manager LLC, Ivanka Trump Revocable Trust, OPO Hotel Manager LLC, OPO Hotel Manager Member Corp., Trump Old Post Office LLC, and Trump Old Post Office Member Corp. Letter from Kevin Terry, Contracting Officer, Gen. Serv. Admin., to Donald J. Trump, President, United States 2 (Feb. 10, 2017), *available at* https://www.documentcloud.org/documents/3525993-Contracting-Officer-Letter-March-23-2017.html#document/p161/a346553 [https://perma.cc/9Q47-PKJ4] (listing entities with ownership interests in tenant, Trump Old Post Office LLC, which owns lease to building). In a letter dated February 10, 2017, the General Services Administration ("GSA") stated, "We understand that the property of the Donald J. Trump Revocable Trust ("Trust") includes interests in DJT Holdings LLC and DJT Holdings Managing Member LLC." *Id.* at 2, 4.

[9] *Id.* at 1 (noting that ground lease for post office building is between U.S. government, acting through GSA, and Trump Old Post Office LLC).

[10] Letter from Sheri A. Dillon, Partner, Morgan, Lewis & Bockius LLP, to Kevin Terry, Contracting Officer, Gen. Serv. Admin. 5 (Feb. 17, 2017), https://www.documentcloud.org/documents/3525993-Contracting-Officer-Letter-March-23-2017.html#document/p161/a346553 [https://perma.cc/6V2N-987M] ("No . . . elected official of the Government of the United States . . . *shall be admitted* to any share or part of this Lease, or to any benefit that may arise therefrom . . . ." (emphasis added)).

[11] Editorial, *Isn't Some of the Trump Hotel Profit Ours?*, N.Y. TIMES, May 29, 2017, at A20 ("Since Mr. Trump won the election, the hotel has been booked for parties thrown by the governments of Azerbaijan, Bahrain and Kuwait, which moved their events from other hotels to Mr. Trump's.").

[12] *See* U.S. CONST. art. I, § 9, cl. 8 ("[N]o Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."). *But see*, Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639, 641-42 (arguing that constitutional emoluments prohibition applies only to compensation for services performed).

In June 2017, two hundred members of the United States Congress filed a civil action against President Trump to enforce the Emoluments Clause and enjoin his acceptance of benefits from foreign states without prior Congressional consent.[13] Significantly, the complaint singles out President Trump's refusal to disclose information about his businesses as a particular impediment to Congress' ability to detect potential violations of federal law and the Constitution.[14]

President Trump contends that laws prohibiting conflicts of interest do not apply to him,[15] but that he nevertheless has resolved all possible conflicts voluntarily by transferring ownership of his business interests to the "Donald J. Trump Revocable Trust."[16] President Trump is a current trust beneficiary and retains the power to unilaterally revoke the trust.[17] President Trump's selection of closely related trustees—his two adult sons and his longtime chief financial officer[18]—implies further control over the trust's administration.

President Trump's attorneys maintain that his revocable trust sanitizes all improper business conflicts—specifically, they claim that the Trump International Hotel lessors comply with the GSA lease because Trump's indirect ownership in the trust means that he is not "admitted" (quoting the GSA

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[13] Complaint ¶¶ 6, 54, Blumenthal v. Trump, No. 17-cv-01154, 2017 WL 2561946 (D.D.C. June 14, 2017) (citing number of senators and representatives joining in action and discussing injunctive relief enjoining President Trump from accepting emoluments from foreign states without consent of Congress).

[14] Paragraph 35 of the Complaint avers:

> While it is well known that [President Trump's] business empire is vast and global, the exact nature of his holdings and the benefits he receives from them remain unclear. [President Trump] has refused to release his tax returns, and the complicated interconnection between the hundreds of discrete business entities and shell companies in which he owns an interest makes it impossible to determine the full scope of the benefits he is currently accepting from foreign states.

Id. ¶ 35.

[15] Susanne Craig & Eric Lipton, *Trump's Plans on Businesses May Fall Short*, N.Y. TIMES, Jan. 12, 2017, at A1 ("The president-elect, speaking at a news conference Wednesday in Trump Tower, repeated his view, expressed shortly after his election, that as president, he will be exempt from conflict of interest laws that apply to all other federal employees except the vice president.").

[16] *See* Susanne Craig & Eric Lipton, *Trust Records Show Trump Is Still Closely Tied to His Empire*, N.Y. TIMES (Feb. 3, 2017), https://www.nytimes.com/2017/02/03/us/politics/donald-trump-business.html ("[T]he purpose of the Donald J. Trump Revocable Trust is to hold assets for the 'exclusive benefit' of the president."); Craig & Lipton, *supra* note 15 ("[Trump] would place his vast business empire in a trust controlled by his two oldest sons . . . .").

[17] Letter from Kevin Terry, *supra* note 8, at 5 (citing author's understanding that trustees of Donald J. Trump Revocable Trust must distribute income to President at his request).

[18] Craig & Lipton, *supra* note 16 (noting that trustees of President's trust are eldest son and Trump Organization's Chief Financial Officer).

agreement) to share in the lease.[19] But this contention, dubious on its face, is impossible to verify because President Trump has neither produced the trust instrument, nor itemized the property held in trust, nor disclosed adequate information regarding the purported restrictions on his beneficial interest.[20] President Trump's claim that "the Trust precludes the Trustees from providing any reports or information to Mr. Trump regarding the holdings or sources of income of the Trust"[21] is also unsatisfying, without public access to the trust itself, because the settlor of a revocable trust ordinarily retains the right to modify such restrictions.[22]

President Trump's brazen repudiation of transparency, thus, precludes Congress and other government units from evaluating the claim that his revocable trust adequately protects the government from improper entanglement with private business dealings.[23] But has President Trump violated any prohibition of *trust law* by refusing to disclose information about his revocable trust to Congress or the government? How, if at all, does trust law regulate the duty of trustees to disclose information under these circumstances?

In short, trust law defers almost entirely to the settlor's privacy preferences. The widely adopted Uniform Trust Code, for instance, imposes duties on trustees to inform and report, including a duty to furnish a copy of the trust instrument, but such duties are owed exclusively to the trust beneficiaries, not the government.[24] And those duties, limited as they are, can be waived by the settlor in many states.[25] Under prevailing trust law principles, a settlor's

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[19] Letter from Sheri A. Dillon, *supra* note 10, at 5-8 (arguing as to meaning of term "admitted" and claiming that President Trump is "other entity" and thus not admitted to share in lease).

[20] *See id.* at 5 (describing steps taken by President Trump to relinquish management of holdings).

[21] *Id.*

[22] *See* UNIF. TRUST CODE § 602(a) (UNIF. LAW COMM'N, amended 2010) ("Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust.").

[23] *See* Lipton & Craig, *supra* note 5, at A1 (noting that notwithstanding release of certain information regarding financial holdings, "it is unclear how much information was not disclosed, in part because [President Trump] declined to release even a summary of his tax returns").

[24] UNIF. TRUST CODE § 813 cmt. (UNIF. LAW COMM'N, amended 2010) ("Subsection (a) of this section limits the duty to keep the beneficiaries informed to the qualified beneficiaries.").

[25] The duty to inform and report is not among the mandatory rules enumerated in section 105 of the Uniform Trust Code. *See* UNIF. TRUST CODE § 105 (UNIF. LAW COMM'N, amended 2010). The mandatory duties described in section 105(b)(8)-(9) were placed in brackets by the uniform law commissioners and, in any event, do not apply at all to revocable trusts. *Id.* at cmt. ("Neither subsection (b)(8) nor (b)(9) apply to revocable trusts. The settlor of a revocable trust may waive all reporting to the beneficiaries, even in the event the settlor loses capacity.").

assertion of trust privacy is a presumed, if not inherent, tenet of trust law.[26] Thus, as a matter of trust law, President Trump's assertion of privacy is entirely legal.

Trust privacy protections, however, can inflict significant harm on governmental interests by hindering law enforcement agencies from investigating violations of civil and criminal law.[27] While President Trump's refusal to produce his trust instrument may impede Congress and other government units from investigating potential violations of law,[28] his public disclosure of the trust's *existence* at least permits investigators to use legal processes to compel its production, whether in the context of civil litigation or a criminal investigation.[29] By contrast, most individuals who use private trusts and trust-like beneficial ownership arrangements to conceal financial crimes, tax evasion, money laundering, or proceeds from illicit activity do so entirely under the radar.[30] In *United States v. Manafort*,[31] for example, the government alleged that two of President Trump's campaign aides engaged in money laundering and did so through the use of opaque and difficult to track offshore and domestic accounts for which they were in fact beneficial owners.[32]

[26] *Cf.* Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 558-59 (2008) (noting that trust law "reformers simply take trust privacy as a given").

[27] *See* FIN. ACTION TASK FORCE, ANTI-MONEY LAUNDERING AND COUNTER-TERRORIST FINANCING MEASURES: UNITED STATES 4 (2016) (citing "[l]ack of timely access to adequate, accurate and current beneficial ownership (BO) information [as] one of the fundamental gaps in the U.S. context").

[28] *See supra* notes 15-21 and accompanying text (discussing President Trump's actions with regard to trust and resulting effects on law enforcement).

[29] *See* FIN. ACTION TASK FORCE, *supra* note 27, at 157 (citing Finding 414, which states, "[w]ith respect to legal arrangements, there do not appear to be any obstacles preventing [law enforcement agencies] from accessing [beneficial ownership] information that may be held by trustees. However, there is no explicit obligation either in State common or statute law, or in the [Bank Secrecy Act], that obliges trustees to gather and retain [beneficial ownership] information . . . ").

[30] *See, e.g.*, *id.* at 155-56 (citing Finding 405, which notes use of legal arrangements for money laundering and states that "trusts have been identified in complex [money laundering] schemes, but there is no information on the numbers of trusts organized under U.S. States' laws").

[31] 314 F. Supp. 3d 258 (D.D.C. 2018).

[32] Government's Memorandum in Support of Conditions of Release, Complex Case Designation and Notice of Intent to Use Certain Bank Records at 10-11, *Manafort*, 314 F. Supp. 3d (No. 1:17-cr-00201), 2018 WL 3079474, ECF No. 14 ("The indictment sets forth and charges the defendants with engaging in a long running and complex scheme to funnel millions of dollars into the United States, through various entities and accounts in Cyprus, Grenadines, Seychelles and England, owned or controlled by the defendants worldwide, and passed through a series of foreign accounts. Manafort, Gates, and a Russian national—who is a longstanding employee of Davis Manafort Partners, Inc. and DMP International LLC (collectively DMI)—served as the beneficial owners and signatories on these accounts. The

Many other countries limit trust privacy to preserve the State's unimpeded authority to investigate money-related misconduct.[33] But the United States has not enacted such limitations and this laissez-faire approach has cast it as a notable outlier among developed nations that comply with international due diligence and transparency standards for beneficial ownership interests.[34] Indeed, in December 2016, the Financial Action Task Force ("FATF"), a leading inter-governmental body, criticized U.S. trust law for failing to meet those standards–a failure that undermines the U.S. government's ability to investigate money laundering, tax evasion, and other forms of financial misconduct.[35]

From the perspective of the governmental interest, the absence of due diligence and disclosure mandates represents an *under-regulation* of wealth transfer law because the State has failed to assert a sovereign interest in overriding donor preferences that interfere with law enforcement.[36] Other examples of under-regulation undermining the governmental interest in private wealth transfer include the failure of disclaimer law to adequately protect the government from Medicaid abuse and tax delinquencies.[37]

In contrast to trust law's nearly full capitulation to donor preferences in the above contexts, still other aspects of wealth transfer law appear to *over-regulate* property succession in ways that not only undermine governmental interests, but also (curiously) override donative preferences that, if otherwise enforced, would lessen the burdens of government. Consider, for example, the Uniform Trust

indictment also alleges that more than $75 million flowed through these overseas accounts, and the government has substantial documentary evidence to support that allegation.").

[33] *See* Reid K. Weisbord, *A Catharsis for U.S. Trust Law: American Reflections on the Panama Papers*, 116 COLUM. L. REV. ONLINE 93, 104 (2016) (noting that "most states nevertheless impose minimal requirements for trust documentation").

[34] *See id.* at 105 ("It is, perhaps, due to these lax documentation and disclosure requirements that the United States is now considered one of the most favorable international trust havens and has attracted assets from off-shore jurisdictions that recently tightened their trust disclosure rules.").

[35] FIN. ACTION TASK FORCE, *supra* note 27, at 156, 161 (concluding in Finding 425 that "U.S. is rated as having a low level of effectiveness for" Immediate Outcome 5, FATF standard pertaining to "mitigating measures to prevent the misuse of legal persons and arrangements"). The Task Force reached similar conclusions in its prior report ten years earlier. FIN. ACTION TASK FORCE, SUMMARY OF THE THIRD MUTUAL EVALUATION REPORT ON ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM: UNITED STATES OF AMERICA 15 (2006) (concluding United States had "no measures in place" to ensure timely access to information on beneficial ownership of trusts by authorities and that such available information was "minimal").

[36] *See* Weisbord, *supra* note 33, at 104 (noting that United States has not adopted recommended standards for combating money laundering and terrorism finance, such as stricter disclosure requirements for trusts).

[37] *Cf.* William P. LaPiana, *Some Property Law Issues in the Law of Disclaimers*, 38 REAL PROP. PROB. & TR. J. 207, 234-35 (2003) (describing exceptions to relation back doctrine in cases of disclaimer).

Code's mandate requiring the admissibility of extrinsic evidence for trust interpretation and the court's reformation power to correct mistaken terms or language in a written trust instrument.[38] Unlike the law of contracts, which generally enforces agreements to regulate the admissibility of extrinsic evidence and follows a more limited approach for applying reformation,[39] trust law does not recognize an analogous doctrine of merger and mandates a broader reformation doctrine for the purpose of facilitating donor intent without regard for contrary donor preferences.[40]

From the perspective of the governmental interest, such mandates strongly favoring the admissibility of extrinsic evidence and invocation of reformation are undesirable because they generally increase the cost, complexity, and duration of judicial proceedings borne by the government.[41] The mandatory character of these rules is also peculiar because it overrides the freedom of disposition in cases where the donor's voluntarily self-imposed preferences would, if given effect, economize judicial resources. Similar tension between private and governmental interests arises in jurisdictions that limit or set aside "no contest" clauses and testamentary arbitration provisions because, if enforced according to the donor's manifested preferences, such provisions would lessen the governmental burdens by reducing the number of wills and trusts cases on court dockets.[42]

In juxtaposing these seemingly disparate rules, this Article reveals incoherence in the mandatory regulation of donative transfers and, more importantly, a lacking regard for the governmental interest in the private wealth transfer system. Due consideration for the governmental stake in wealth transfer law, as described below, would provide a more coherent basis for reversal or reform of these missing and misplaced mandates.

The Article proceeds as follows: Part I articulates a novel theory of governmental interest in private wealth transfer and acknowledges the public-

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[38] UNIF. TRUST CODE § 415 (UNIF. LAW COMM'N, amended 2010) (outlining that court may reform trusts to correct mistakes). The comment to section 415 of the Code further notes that "reliance on extrinsic evidence is essential." *Id.* cmt.

[39] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 155 cmt. c (AM. LAW INST. 1981) ("Because experience teaches that mistakes are the exception and not the rule, the trier of the facts should examine the evidence with particular care when it relates to a party's assertion of mistake . . . .").

[40] UNIF. TRUST CODE § 105(b)(4) (UNIF. LAW COMM'N, amended 2010) (noting that "power of the court to modify or terminate a trust under Sections 410 through 416" prevails over any term of trust).

[41] *See, e.g.*, Horton, *supra* note 3, at 550 (discussing "anti-externality" benefits of formalism).

[42] *See, e.g.*, FLA. STAT. § 732.517 (2018) ("A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable."); *In re* Fellman, 604 A.2d 263, 267 (Pa. Super. Ct. 1992) (mandatory arbitration clause held unenforceable in challenge over settlor's competency to revoke revocable trust).

private tension underlying regulation that protects the government's interest at the cost of constraining dispositional freedom. Part II examines the governmental interest in enforcing criminal and civil laws, with a particular focus on trust privacy's role in enabling the concealment of financial crime. Part III considers the governmental interest in the conservation and allocation of public financial resources, with particular focus on the under-regulation of disclaimers subject to government liens, including Medicaid claims and tax delinquencies, that subjugate government claims against disclaimants. Part IV examines the governmental interest in efficiency in the administration of justice, with a particular focus on mandates imposing the doctrine of reformation and the admissibility of extrinsic evidence, and the unenforceability of "no contest" and arbitration clauses.

I. THE GOVERNMENTAL STAKE IN PRIVATE WEALTH TRANSFER AND THE FREEDOM OF DISPOSITION

For more than thirty years, wealth transfer law in the United States has been in flux as reformers have sought to recalibrate the permissible scope of donative freedom and the role of deadhand control.[43] Aided by multiple national law reform projects,[44] a majority of states have enacted or considered reforms to keep pace with evolving social norms concerning the inheritance rights of spouses and family members,[45] emerging trends of wealth transmission (including preferences for dynasty and asset protection trusts),[46] changes in tax law,[47] and new technologies impacting the estate planning process.[48] These reforms, in turn, brought into sharp relief longstanding tension between the competing interests of individual autonomy underlying dispositional freedom and socially minded policies calling for limits on donative autonomy.[49]

[43] *See* Reid Kress Weisbord, *Trust Term Extension*, 67 FLA. L. REV. 73, 81 (2015) (citing most states' repeal of Rule Against Perpetuities over last thirty years).

[44] These law reform projects include promulgation or significant revision to the Uniform Probate Code, Uniform Trust Code, the Restatement (Third) of Property: Wills & Other Donative Transfers, and the Restatement (Third) of Trusts. *See, e.g.*, Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855, 858-59 (2012).

[45] *See* Kelly, *supra* note 4, at 1128 n.9 ("In the United States, all separate property states, except Georgia, provide a spousal elective share.").

[46] *See* Sterk, *supra* note 3, at 1037-38 (discussing efforts undertaken by states to help trust settlors shield assets from creditors and to allow creation of "Dynasty Trusts").

[47] *See, e.g.*, Michael J. Graetz, *"Death Tax" Politics*, 57 B.C. L. REV. 801, 803 (2016) (discussing California's 1982 vote to abolish inheritance tax in response to national tax reform efforts).

[48] *See, e.g.*, NEV. REV. STAT. § 133.085 (2018) (regulating electronic wills).

[49] *See, e.g.*, Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 50-51 (1992) (discussing potential regulation of use restrictions and Rule Against Perpetuities).

Although unbridled deference to deadhand control is generally disfavored by scholars[50] as well as most foreign systems of property succession,[51] donative freedom has prevailed as the dominant rationale for regulating gratuitous transfers of property in the United States.[52] The freedom of disposition is often justified on grounds that it tends to maximize social welfare by creating the best incentives for donors and donees with respect to the use and enjoyment of property.[53] Thus, most wealth transfer law reforms have strengthened donor control over gratuitous transfers,[54] and conventional wisdom holds that this field of law is almost entirely organized around broad principles of donative freedom.[55]

The last few decades, in particular, have reaffirmed the expanding scope of donor and deadhand control of gifted property.[56] The power to transmit property at death has been protected (at least nominally) by the Constitution since 1987,[57] and a majority of states have significantly increased the permissible duration of deadhand control through statutory abrogation or repeal of the common law Rule Against Perpetuities.[58] Dispositional freedom also supplied the most persuasive

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[50] *See* Hirsch, *supra* note 3, at 2251 ("The weight of scholarly opinion nowadays favors whittling down freedom of testation.").

[51] For a list of foreign jurisdictions that prohibit the disinheritance of children, see Ralph C. Brashier, *Protecting the Child from Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1 n.3 (1996).

[52] *See supra* note 1 and accompanying text.

[53] *See, e.g.*, Glover, *supra* note 4, at 6 (arguing that social welfare benefits from testamentary freedom); Kelly, *supra* note 4, at 1135-36 (discussing potential economic justifications for testamentary freedom).

[54] *See* Mark Glover, *A Therapeutic Jurisprudential Framework of Estate Planning*, 35 SEATTLE U. L. REV. 427, 444-45 (2012) ("Testamentary freedom is so fundamental that it has consistently been heralded as the keystone of the law of succession."); Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 632 (1989) (describing exaltation by courts of testamentary freedom). *See generally* RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD (2010) (lamenting trend toward expanding reach of posthumous control over property).

[55] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2003) ("The controlling consideration in determining the meaning of a donative document is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law."); *id.* § 10.1 cmt. a ("The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please.").

[56] *See* MADOFF, *supra* note 54, at 57-58 (discussing importance of right to control property disposition after death to American property law and culture).

[57] Hodel v. Irving, 481 U.S. 704, 715 (1987) ("There is no question, however, that the right to pass on valuable property to one's heirs is itself a valuable right.").

[58] *See, e.g.*, Weisbord, *supra* note 43, at 81 ("Over the last thirty years, however, most jurisdictions in the United States abrogated or repealed the Rule Against Perpetuities by statute to permit perpetual or near-perpetual trusts.").

rationale for reforming Wills Act formalities, which had been applied by courts so strictly (and notoriously) that countless reliable wills were invalidated because of harmless execution defects.[59] Deference to economic and emotional autonomy also inheres in the broader superstructure of inheritance law, which generally regulates wealth transfer by default rules rather than mandates—a regulatory framework that facilitates the donor's exercise of choice in estate planning and, in the absence of an articulated preference, the implementation of presumed intent through the application of majoritarian defaults.[60]

Against this backdrop of donor primacy is a smaller body of mandatory regulation that restricts the freedom of disposition and, in most cases, and serves to prevent harm or minimize spillover costs inflicted upon parties other than the donor.[61] Spillover costs, a type of negative externality, occur when a person engages (typically voluntarily) in conduct that imposes harm or costs on non-

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[59] Melanie Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236 (1996) ("The chant for [wills law] reform crescendoed: 'Intent-defeating formalism' must end."); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1036 (1994) ("The problem lies not with the formalities, but with judicial insistence on literal compliance with them."). Professor Leslie explains, "The Revised UPC and the substantial compliance doctrine replace ropes with rubber bands in the simplistic and misguided belief that granting courts more room to maneuver will ensure greater realization of testamentary intent." Leslie, *supra*, at 236 (criticizing courts for paying lip service to testamentary freedom while, in fact, exploiting harmless execution defects as cover for invalidating testator's chosen estate plan because of fact finder's own contrary normative views). For a sampling of recent theoretic scholarship, see Alexander A. Boni-Saenz, *Distributive Justice and Donative Intent*, 65 UCLA L. REV. 324, 328 (2018) (arguing that donative errors, defined as outcomes in which legal system distributed inherited assets contrary to donative intent, are attributable to formalism in wills law and disproportionately affect populations that experience socio-economic disadvantages outside context of inheritance law) and Mark Glover, *Probate-Error Costs*, 49 CONN. L. REV. 613, 645 (2016) ("The recognition of the primacy of freedom of disposition within the modern law of succession changes the error-cost analysis related to the authentication of wills.").

[60] *See, e.g.*, Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1032 (2004) (noting that "the bulk" of inheritance doctrines "comprise default rules"); Reid K. Weisbord & David Horton, *Boilerplate and Default Rules in Wills Law: An Empirical Analysis*, 103 IOWA L. REV. 663, 670 (2018) ("[A]reas that place a premium on autonomy—such as contracts, corporations, and wills and trusts—consist largely of default rules, which are waivable."). *But see* Langbein, *supra* note 3, at 1105-06 (2004) (contrasting intent-defeating mandatory trust law rules that "limit the power of a departed settlor to prescribe how the trustee must invest trust assets or how the beneficiaries are to order their lives or use the transferred wealth" with intent-implementing mandatory rules "that channel and facilitate, rather than defeat, the settlor's purpose").

[61] *See* Horton, *supra* note 3, at 577 ("[T]he need to prevent spillover costs—not the desire to carry out a decedent's intent—furnishes the most forceful reasons to take the Wills Act at its letter.").

consenting third parties.[62] When the person who causes a negative externality is not forced to internalize the resulting spillover costs, she typically has no incentive to abstain from the harmful activity or to incur the cost of preventing spillover effects.[63] Economic theory suggests that spillover costs can be regulated efficiently and effectively by prohibiting the harmful conduct even though doing so may interfere with private law norms respecting individual autonomy and the freedom of transaction.[64]

Wealth transfer law's small handful of public policy limitations on dispositional freedom are aimed mostly at protecting the rights of non-consenting private third parties, such as disinherited surviving spouses[65] and, to a lesser extent, unpaid creditors.[66] These limitations are decidedly narrow[67] because most private beneficiaries do not require protection from the costs of

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[62] *See* Hirsch, *supra* note 3, at 2190.

[63] *See generally* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (discussing problem of social harm).

[64] *See* Hirsch, *supra* note 3, at 2204 ("In sum, economic analysis—applicable both to freedom of contract and freedom of testation—potentially justifies nullification only of conditions that . . . entail tangible spillover costs."); Horton, *supra* note 3, at 573-75 (discussing potential for testamentary formalism to prevent negative externalities). Judge Guido Calabresi and Professor Douglas Melamed illustrated this principle in the classic context of land use regulation, in which zoning laws prohibit a property owner from selling her land to a polluter because the polluter's land use generates spillover costs (including lower land values) for non-consenting neighbors: "Barring the sale to polluters will be the most efficient result because it is clear that avoiding pollution is cheaper than paying its costs—including its costs to the [neighbors]." Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111 (1972).

[65] Separate property states protect the surviving spouse against disinheritance by providing a forced elective share against the decedent's estate, while community property states provide the surviving spouse with a minimum inheritance equal to half the value of all community property. UNIF. PROBATE CODE pt. 2 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, amended 2010).

[66] The Uniform Trust Code section 501 protects the rights of creditors of a beneficiary to attach future trust distributions, but this protection is significantly weakened by section 502's authorization of spendthrift trusts. UNIF. TRUST CODE § 501 (UNIF. LAW COMM'N, amended 2010) ("To the extent a beneficiary's interest is not subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary.").

[67] Wealth transfer law recognizes another narrow limitation on dispositional freedom for restrictions that unreasonably interfere with the freedom to marry or divorce. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. j (AM. L.AW INST. 2003) ("[A] trust provision is ordinarily invalid if it tends seriously to interfere with or inhibit the exercise of a beneficiary's freedom to obtain a divorce (creating a risk, e.g., of encouraging financial dependency upon an abusive relationship) or the exercise of freedom to marry, either by limiting the beneficiary's selection of a spouse or by unduly postponing the time of marriage.").

complying with the terms of a donative transfer—beneficiaries who do not wish to comply with property restrictions imposed by a donor may disclaim the gift in whole or in part.[68]

The scholarship on wealth transfer law mandates reflects a primary concern for the protection of private third parties.[69] And yet, a small cohort of scholars have also begun to contemplate whether mandatory limitations on dispositional freedom should also take into account externalized costs imposed on the government in the form of increased adjudication costs and public benefits payable to surviving family members impoverished by disinheritance.[70] The scholarship on spousal disinheritance, in particular, has examined features of the elective share and community property rules that help to contain the costs imposed upon the government to support a disinherited impoverished surviving

[68] *See, e.g.*, UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 5(a) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, amended 2010) ("A person may disclaim, in whole or part, any interest in or power over property, including a power of appointment."); Hirsch, *supra* note 3, at 2240 ("[C]ostly conditions attached to present bequests cause no loss of efficiency[] because the beneficiary can always choose to forfeit the bequest if its cost exceeds its benefit.").

[69] *See, e.g.*, Glover, *supra* note 4, at 24 (discussing negative externalities); Hirsch, *supra* note 4, at 804 (arguing that legislation to prevent spillover costs to government "would comprise a major break with tradition"); Hirsch, *supra* note 3, at 2204 (considering freedom of testation and spillover costs); Kelly, *supra* note 4, at 1173 (noting that "facilitating donative intent may . . . [promote] social welfare"). One of the most notable recent contributions in this area of the literature examines the regulation of emerging technologies that generate new types of spillover costs at death, such as electronic wills and digital assets. *See* Horton, *supra* note 3, at 573-77 (explaining that heightened formality requirements for electronic wills can be justified on anti-externality grounds because, absent legal standard for preserving, storing, and formatting electronic wills, decedent's survivors must bear spillover costs of searching through decedent's old, potentially obsolete, computing devices for correct file and recovering electronic will file in readable format).

[70] *See* Glover, *supra* note 4, at 36-37 (citing cost of providing government support for disinherited children who become wards of state); Hirsch, *supra* note 3, at 2236 (noting that freedom to disinherit children can also generate spillover costs borne by taxpayers when decedent's disinherited child is forced to seek public assistance); Horton, *supra* note 3, at 574-75 (citing scholars' concerns with increased adjudication costs of probating wills under relaxed formality standards and curative doctrines for defects of will execution); Kelly, *supra* note 4, at 1128 (discussing cost of providing government support for disinherited spouses left in poverty); Stewart E. Sterk, *Trust Decanting: A Critical Perspective*, 38 CARDOZO L. REV. 1993, 2027 (2017) (outlining potential costs of probate process); *see, e.g.*, Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 368 (claiming formalities standardize succession to "make the process smooth, uniform and efficient"); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 494 (1975) (noting that standardization aids in judicial implementation).

spouse.[71] But this literature has yet to articulate a broader theoretical framework for containing spillover costs borne by the government and for determining when and which governmental interests should prevail over a donor's stated contrary preference.

Responding to this theoretical gap in the literature, this Part first identifies a non-exhaustive list of at least three governmental interests that justify reconsideration of existing regulations on private wealth transfer: (1) enforcement of criminal and civil laws, (2) conservation and allocation of public financial resources, and (3) efficiency in the administration of justice.

The first governmental interest, enforcement of criminal and civil laws, represents the most fundamental responsibility of any governing state—to protect and provide security for the general populace.[72] The preservation of civil order and maintenance of a peaceful society depends on the enforcement of legal prohibitions, and the government is the state actor authorized to pursue such enforcement. In the wealth transfer context, the government has an obviously legitimate interest in setting aside a donative transfer that, itself, violates the law (such as a trust that expressly conditions the distribution of assets on the beneficiary's commission of a crime).[73] But the government also has an equally legitimate sovereign interest in regulating transfers that are otherwise legal, but hinder the government's ability to detect illegal conduct (such as a confidential trust used by the beneficiary to commit a crime).

The second governmental interest in private wealth transfer, the conservation and allocation of public financial resources, represents the sovereign interest in raising public revenues and managing assets held by the State for public benefit.[74] The government generally protects this sovereign interest by imposing

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[71] Glover, *supra* note 4, at 36-37; Adam J. Hirsch, *Inheritance on the Fringes of Marriage*, 2018 U. ILL. L. REV. 235, 239-40 (2018).

[72] *See, e.g.*, CAL. CONST. art. II, § 1 ("Government is instituted for [the people's] protection, security, and benefit . . . ."); N.J. CONST. art. I, para. 2 ("Government is instituted for the protection, security, and benefit of the people . . . ."); Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 601 (1982) (noting that sovereign interests of State include "exercise of sovereign power over individuals and entities within the relevant jurisdiction—this involves the power to create and enforce a legal code, both civil and criminal"); *cf.* Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 475 (2004) ("The most obvious power of states that follows from the original meaning of the Privileges or Immunities Clause is the power to prohibit any violations by some citizens of the liberties or rights of other citizens.").

[73] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003) ("American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law."); Glover, *supra* note 4, at 4.

[74] U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").

and enforcing the tax code (including compulsory tax collection),[75] and by regulating access to public assistance programs for the needy, such as Medicaid, through the enforcement of eligibility restrictions.[76] Such compliance tools ensure that the State's resources are allocated fairly and that all persons pay for and receive a proper share of governmental resources.[77] To do otherwise would undermine the solvency of the public fisc and the social safety net programs funded by the government.

The third governmental interest, maximizing efficiency in the administration of justice, reflects a longstanding and bipartisan political preference to streamline the costs and burdens of government bureaucracy.[78] The efficient administration of justice reduces the costs and burdens borne by taxpayers in funding the government as a whole.[79] In the private wealth transfer context, this interest is served by principles of judicial economy that favor conserving the resources of courts through procedural rules that, where appropriate, reduce the volume of litigated matters.[80]

To the maximum possible extent, any theory of governmental interest in wealth transfer law should seek to minimize undue interference with the substantive core of dispositional freedom, particularly those aspects of dispositional freedom protected by the Constitution. For these purposes, this substantive core may be defined as the donor's right to select the identity of each

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[75] United States v. Hester, 137 F.2d 145, 147-48 (10th Cir. 1943) ("A necessary incident of the power to tax property is the power to uniformly enforce the collection of the tax by any constitutional means deemed appropriate to that end."); United States v. 288 Packages of Merry World Tobacco, 103 F. 453, 454 (D.W. Va. 1900) ("[A]ll means which are necessary to be exercised for the legitimate purpose of levying taxes and collecting the same may be employed to that end.").

[76] *See, e.g.*, 42 U.S.C. § 1396(b)(2)(B) (2012) ("Medicaid and CHIP eligibility policies, including a determination of the degree to which Federal and State policies provide health care coverage to needy populations.").

[77] *Cf.* Forsyth v. Rowe, 629 A.2d 379, 385 (Conn. 1993) ("The medicaid program would be at fiscal risk if individuals were permitted to preserve assets for their heirs while receiving medicaid benefits from the state.").

[78] This preference for decreasing the burdens of government has been articulated on numerous occasions by U.S. Presidents. President Ronald Reagan, in his Inaugural Address, claimed that "government is not the solution to our problem; government is the problem." Ronald Reagan, *Inaugural Address*, THE AM. PRESIDENCY PROJECT (Jan. 20, 1981), http://www.presidency.ucsb.edu/ws/?pid=43130 [https://perma.cc/Z84B-L2HX]. President Bill Clinton argued in his State of the Union Address that "[t]he era of big government is over." PBS, *"The Era of Big Government is Over:" Clinton's 1996 State of the Union*, WASH. WEEK (Jan. 26, 1996), http://www.pbs.org/weta/washingtonweek/web-video/era-big-government-over-clintons-1996-state-union [https://perma.cc/6CRA-MJ4W].

[79] *Cf.* Horton, *supra* note 3, at 574 (arguing that Wills Act formalities encourage efficient adjudication in "bureaucratic world of probate").

[80] *Cf.* Flying Tiger Line v. Teamsters Pension Tr. Fund of Phila., 830 F.2d 1241, 1248 (3d Cir. 1987) ("[A]rbitration promotes judicial economy and judicial restraint.").

beneficiary as well as the amount and form of property to be given to each beneficiary. In *Hodel v. Irving*,[81] the Supreme Court characterized testamentary freedom as "the right to pass on property [at death]—to one's family in particular" and held that, under the Fifth Amendment's Takings Clause, Congress could not totally abolish the power to transmit property at death.[82] Similarly, the Third Restatement of Property emphasizes the sanctity of the donor's choices about property allocation: "American law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property."[83] Taken together, *Hodel*'s protection of the "right to pass on property" and the Restatement's directive to courts not to question the wisdom or reasonableness in making such decisions imply that the core freedom of disposition protects a broad power to determine *who gets what*.[84]

Beyond this substantive core, however, the government enjoys a wider lane of authority to override donative preferences when necessary to protect itself from harm or negative externalities.[85] While granting great deference to donors in the allocation of property, both *Hodel* and the Restatement clearly reserve for the legislature broad powers to regulate the evidentiary rules for ascertaining donative intent and procedural rules for distributing property.[86] In *Hodel*, the Supreme Court explained that the legislature retains "broad authority to adjust the rules governing the descent and devise of property without implicating the [constitutional] guarantees . . . ."[87] The Restatement acknowledges the need for donative intent to yield when contrary to other public policy or other legal prohibitions: "American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is

[81] 481 U.S. 704 (1987).

[82] *Id.* at 716; *cf.* Hirsch & Wang, *supra* note 49, at 12 ("[D]istribution of the decedent's resources in response to the particular needs of family members is assumed to be a social virtue, one that freedom of testation promotes.").

[83] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003).

[84] *Hodel*, 481 U.S. at 716 (citing right to pass on property after death); *cf.* Schneider v. Vosburgh, 106 N.W. 1129, 1130 (Mich. 1906) (stating that person with donative capacity may make "will or a deed as eccentric, as injudicious, or as unjust as caprice, frivolity, revenge can dictate").

[85] *See Hodel*, 481 U.S. at 716 (finding federal regulation of testamentary disposition unconstitutional only where it amounts to de facto "abrogation of the right" to pass on property).

[86] *See id.* (rejecting particular regulation on passing property, but also noting regulation was extraordinary); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003) (noting that law facilitates achieving intent of donors by implementing rules to enable determination of intent).

[87] *Hodel*, 481 U.S. at 717 (1987).

prohibited or restricted by an overriding rule of law."[88] Thus, taken together, *Hodel* and the Restatement imply that the freedom of disposition is not absolute and does not require that donors always be given a choice of procedural, discovery, litigation, or interpretative rules governing an estate or donative instrument.

II. ENFORCEMENT OF CRIMINAL AND CIVIL LAWS

This Part examines the government's interest in enforcing criminal and civil laws, a critical public function that ranks at or near the top of any prioritized hierarchy of state responsibility. This Part singles out one particular aspect of wealth transfer law, trust privacy, which enforces donative preferences in a manner contrary to this governmental interest. As explained below, trust law's sweeping deference to settlor privacy preferences allows nefarious trust settlors to conceal the commission of financial crimes.

Trust law in the United States is highly deferential to settlor preferences for privacy as to the existence and nature of the trust relationship.[89] Partly in response to the unwanted publicity of wills, which become matters of public record once probated, *inter vivos* trusts have emerged as a popular estate planning device for donors seeking privacy in the gratuitous transfer of property.[90] Wills are matters of public record because all judicial proceedings, including the probating of decedent's estates, are generally open to public inspection.[91] *Inter vivos* trusts, by contrast, grant powers of administration and distribution to private trustees rather than a probate court, and trustees typically carry out all trust business without any contact with the court system.[92] Trust

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[88] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003).

[89] *See* Foster, *supra* note 26, at 558-59 (highlighting how privacy rights deny beneficiaries "fundamental information required to enforce the trust and to monitor trustee conduct"); Weisbord, *supra* note 33, at 104 (noting how United States has yet to adopt Organisation for Economic Co-operation and Development ("OECD") guidelines that enhance protections against money laundering and terrorism financing).

[90] *See, e.g.*, Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 ARIZ. ST. L.J. 713, 714-16 (2006) (using Marlon Brando's will as example of how *inter vivos* trust is not public record while normally wills become public record upon death).

[91] *See, e.g.*, Estate of Hearst, 136 Cal. Rptr. 821, 825 (Ct. App. 1977) ("Absent strong countervailing reasons, the public has a legitimate interest and right of general access to court records, one of special importance when probate involves a large estate with on-going long-term trusts which reputedly administer and control a major publishing empire."); *In re* Estate of Engelhardt, 127 Ohio Misc. 2d 12, 2004-Ohio-825, 804 N.E.2d 1052, ¶¶ 1, 25 (denying application to remove estate files from court website).

[92] Professor Frances Foster has written most prominently on the issue of wealth transfer privacy and observes that, under the current law of wills, the public interest in access to judicial proceedings prevails over the privacy preferences of testators and their beneficiaries. Foster, *supra* note 26, at 561-62, 566 (discussing distinction between public and private

privacy is often desirable to settlors because it avoids unwanted publicity about the settlor's estate plan, prevents third-party wrongdoers from learning the existence of assets against which they might perpetrate fraud or financial crimes, and restricts beneficiaries from accessing information about dispositions to each other that could trigger vexatious estate litigation.[93] Preference for at least some degree of trust privacy is understandable, if not advisable, in the modern age of internet hacking and identity theft.

A. *Trust Privacy*

Trust privacy is also consistent with prevailing privacy norms for property ownership and private transactions beyond the immediate context of trust law.[94] Indeed, the law imposes exceedingly few mandatory disclosure requirements for private property ownership, with such mandates generally confined to narrow contexts such as title registration for real property and motor vehicles,[95] and disclosure requirements upon acquisition of more than five percent of a publicly traded company's shares.[96]

Professor Foster, however, criticizes the prevailing approach to trust privacy because it deprives interested parties access to information necessary to evaluate the validity of trusts and the handling of trust assets by trustees[97]: "A trust so private that it lacks beneficiary enforcement and trustee accountability is effectively no trust at all."[98] Foster identifies three possible constraints on trust privacy: (1) a full publicity rule, rendering all trusts a matter of public record; (2) a wills law approach, treating trusts as private during the settlor's lifetime but as public records at death; and (3) an enforcement approach, adopting a wills law approach subject to a lifetime exception in the event of the settlor's

records in probate process); *see also* Foster, *supra* note 90, at 716 (highlighting how wills become public record after death while devising estate by revocable trust keeps documents private).

[93] *Cf.* Foster, *supra* note 90, at 725-27 (noting separation of trust from public sphere, even from trust beneficiary if settlor is living).

[94] *See* Foster, *supra* note 26, at 559 ("The conventional view holds that privacy in transmission of wealth is the ideal.").

[95] *See, e.g.*, KAN. STAT. ANN. § 58-2221 (2018) (requiring recordation of instruments conveying real property); N.J. REV. STAT. § 39:3-4 (2018) (requiring registration of automobiles and motorcycles).

[96] 15 U.S.C. § 78m(d) (2012) (requiring filing of statement of beneficial ownership with Securities and Exchange Commission).

[97] *See* Foster, *supra* note 26, 613-14 ("Trust privacy can leave vulnerable settlors without property or dignity. It can cause trustees unnecessary liability and conflict with beneficiaries. Trust privacy can also leave beneficiaries at the mercy of incompetent, partial, stingy, and larcenous trustees. Finally, it can impede third parties and family members from receiving the money they deserve.").

[98] *Id.* at 619.

incapacity.[99] Foster favors the full publicity approach because it mitigates most of the costs associated with trust privacy, but she recognizes the unlikelihood of such reform "[g]iven the strong pro-privacy sentiment" with regard to private wealth transfers.[100]

Foster's analysis of trust privacy, although persuasive, deals primarily with its impact on private parties such as settlors, beneficiaries, non-beneficiary settlor's family members, and creditors.[101] The government is another important party with an interest in the creation and administration of trusts, for whom trust privacy protections increase the cost of investigatory proceedings and law enforcement in the context of financial crimes.[102] Indeed, trust privacy undermines one of the essential elements of financial regulation—the government's capacity to know of the existence of financial assets, and therefore, knowledge of where to look when initiating an investigation.[103] However, this regulatory principle is demonstrably untrue of trusts.[104] Federal banking law, for instance, requires all federally insured bank depository institutions to document the identity of each accountholder before accepting a monetary deposit.[105] But notably, the federal banking law due diligence requirements do not require trustee depositors to disclose information about the beneficial ownership of a trust.[106]

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[99] *See id.* at 614-18.

[100] *See id.* at 614-15.

[101] *See, e.g.*, *id.* (noting impact on those individuals if full publicity approach were adopted).

[102] *Cf.* Weisbord, *supra* note 33, at 106 (arguing how state trust laws in combination with federal law should address financial misconduct).

[103] *See supra* notes 32-34 and accompanying text.

[104] *See* FIN. ACTION TASK FORCE, *supra* note 27, at 4.

[105] 12 U.S.C. § 1829b(c) (2012) ("[E]ach insured depository institution shall maintain such records and other evidence, in such form as the Secretary shall require, of the identity of each person having an account in the United States with the insured depository institution and of each individual authorized to sign checks, make withdrawals, or otherwise act with respect to any such account."); 31 C.F.R. § 1010.312 (2018) ("Before concluding any transaction with respect to which a report is required . . . , a financial institution shall verify and record the name and address of the individual presenting a transaction, as well as record the identity, account number, and the social security or taxpayer identification number, if any, of any person or entity on whose behalf such transaction is to be effected.").

[106] *Cf.* U.S. DEP'T OF THE TREASURY, FIN. CRIMES ENF'T NETWORK, FREQUENTLY ASKED QUESTIONS REGARDING CUSTOMER DUE DILIGENCE REQUIREMENTS FOR FINANCIAL INSTITUTIONS 8 (2016) ("The preamble to each of the [Customer Identification Program] rules notes that, *while financial institutions are not required to look through a trust to its beneficiaries*, they 'may need to take additional steps to verify the identity of a customer that is not an individual, such as obtaining information about persons with control over the account.'" (emphasis added)); FED. FIN. INSTS. EXAMINATION COUNCIL, BANK SECRECY

Trust law, itself, does not generally mandate documentation or disclosure of beneficial ownership information for law enforcement reporting purposes.[107] Alaska and Idaho appear to be the only states that impose de jure trust registration requirements,[108] but those mandates do not seem to be enforced,[109] and even if they were, the registration rules do not require disclosure of beneficial ownership information most useful to law enforcement agencies (i.e., identity of beneficiaries).[110] Michigan, Missouri, and Nebraska authorize trust registration but impose no mandate to do so.[111] Thus, in the vast majority of states, trusts need not be registered and, in some states, trusts enjoy additional privacy protection from registration requirements elsewhere in the law (such as in the recording of deeds for real property held in the name of a trustee).[112]

ACT/ANTI-MONEY LAUNDERING EXAMINATION MANUAL 281 (2014) (recommending, but not requiring, banks to obtain ownership verification documents including trust instruments).

[107] *See* Weisbord, *supra* note 33, at 104 (noting how certain state laws require minimal documentation for trusts).

[108] ALASKA STAT. § 13.36.005(a) (2018) ("The trustee of a trust having its principal place of administration in this state *shall* register the trust in the court of this state at the principal place of administration." (emphasis added)); IDAHO CODE § 15-7-101 (2018) ("The trustee of a trust having its principal place of administration in this state *shall* register the trust in the court of this state at the principal place of administration." (emphasis added)).

[109] In the absence of enforcement actions or litigation involving these requirements, it is difficult to ascertain whether such duties are enforced in either state, but anecdotal evidence suggests that mandates to disclose or register beneficial ownership information may not be enforced. For example, the Alaska Attorney General issued official guidance implying that the duty to register is optional. *See* OFFICE OF THE ATT'Y GEN., STATE OF ALASKA, FILE NOS. 366-571-83, 366-599-83, KODIAK BROWN BEAR TRUST AGREEMENT, 1983 WL 42575 (July 27, 1983) ("[W]hen the trust agreement is signed by all parties, the trust document *should* be registered according to AS 13.36.005 et seq." (emphasis added)).

[110] For example, Alaska's registration form does not require disclosure of beneficiaries for written *inter vivos* trusts. *See* ALASKA COURT SYS., FORM P-200: REGISTRATION OF TRUST (2006) (disclosure of beneficiaries limited to registration of oral trusts).

[111] *See* MICH. COMP. LAWS § 700.7202(1) (2018) ("By registering a trust or accepting the trusteeship of a registered trust or a trust having its principal place of administration in this state or by moving the principal place of administration to this state, the trustee submits personally to the jurisdiction of the courts of this state regarding any matter involving the trust."); MO. REV. STAT. § 456.027(1) (2018) ("The trustee of a trust having its principal place of administration in this state *may* register the trust in the probate division of the circuit court of the county wherein the principal place of administration is located." (emphasis added)); NEB. REV. STAT. § 30-3816 (2018) ("The trustee of a trust having its principal place of administration in this state *may* register the trust in the county court of this state at the principal place of administration." (emphasis added)).

[112] *See, e.g.*, IOWA CODE § 614.14 (2018) (authorizing affidavit of trust in place of trust instrument); MICH. COMP. LAWS §§ 565.431, 565.432 (2018) (authorizing certificate of trust existence and authority); MINN. STAT. § 501C.1013 (2018) (authorizing recording of certificate of trust rather than trust instrument itself); *see also* Foster, *supra* note 90, at 729

The absence of trust documentation and disclosure requirements places the United States outside the norm of international transparency standards designed to combat money laundering and financial crimes.[113] In December 2016, the FATF, established at the 1989 G-7 Summit in Paris, criticized U.S. trust law for failing to meet international transparency standards on beneficial ownership arrangements, which in turn has the effect of impeding law enforcement activities.[114] A particular shortcoming of U.S. trust law is its failure to impose a duty on trustees to document and disclose to the government the identities of natural persons holding beneficial trust interests.[115] This failure of trust law is compounded by a loophole of federal banking law. Under the Bank Secrecy Act, financial institutions are required to identify, document, and report individuals who perform transactions over ten thousand dollars.[116] The accountholder authentication aspect of this requirement, however, falls short in the trust context because trustees can often open an account without reporting the identities of trust beneficiaries.[117] Of course, this problem implicates, but is not limited to,

(highlighting several states that have "responded to this perceived threat of privacy by restricting trust information now included in land records").

[113] *See* Weisbord, *supra* note 33, at 104 (noting that United States has not adopted OECD recommended standards intended to address financial crimes).

[114] The FATF evaluation concludes in Finding 425 that the "U.S. is rated as having a low level of effectiveness" for Immediate Outcome 5, a FATF standard pertaining to "[m]itigating measures to prevent the misuse of legal persons and arrangements." FIN. ACTION TASK FORCE, *supra* note 27, at 156, 161.

[115] *Id.* at 163 ("There may be barriers to obtaining beneficial ownership (BO) in a timely way, because the U.S. legal framework in this area is seriously deficient, and there are no other measures in place to ensure that BO is collected, maintained and easily accessible to the authorities."). Additionally, "[b]eneficial owner refers to the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement." FIN. ACTION TASK FORCE, INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION 111 (2017).

[116] 31 U.S.C. § 5313(a) (2012) (requiring reports on certain domestic coins and currency actions).

[117] The Bank Secrecy Act provides, "A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made." *Id.* However, the Act delegates extensive regulatory authority to the Secretary of the Treasury, and the Secretary of the Treasury has not exercised its regulatory authority in favor of stringent reporting requirements for trust beneficiaries. *Id.* (extending statutory coverage to "[financial] institution and any other participant in the transaction the Secretary may prescribe"); *cf.* U.S. DEP'T OF THE TREASURY, FIN. CRIMES ENF'T NETWORK, *supra* note 106, at 8 ("The preamble to each of the [Customer Identification Program] rules notes that, *while financial institutions are not required to look through a trust to its beneficiaries*, they 'may need to take additional steps to verify the identity of a customer that is not an individual, such as obtaining information about persons with control over the account.'" (footnote

trust law because individuals seeking to conceal assets also use shell companies and elaborate real estate transactions to hide the owner's true identity.[118] Thus, any reform to trust privacy doctrine must be accompanied by mandatory regulations in these other contexts.

The deregulation of trusts and, in particular, the absence of beneficiary due diligence and government reporting requirements can immunize trusts from detection by law enforcement agencies.[119] Unchecked trust privacy protections, therefore, tend to attract settlors seeking to conceal assets obtained through or associated with criminal activity.[120] In 2016, for instance, concerns about trust deregulation were validated by the Panama Papers scandal which revealed that "ponzi schemers, diamond traders, drug kingpins, Ukrainian oligarchs, Saudi kings, and close associates of Russian President Vladimir Putin" were clients of a Panamanian law firm that specialized in creating and administering such offshore trusts.[121] On the flip side, however, another lesson learned from the Panama Papers is that trust assets are often highly portable, so one might wonder the extent to which heightened domestic regulation of trusts in the United States might encourage settlors to seek offshore jurisdictions with more favorable privacy laws.

One way to balance the competing interests of trust privacy and governmental access for law enforcement purposes would be to mandate that trustees ascertain and disclose beneficial ownership interests to the government and, to protect the privacy of settlors and beneficiaries, require government actors to treat trust information according to the privacy protections currently afforded to federal tax return data.[122] Tax returns and estate planning documents involve overlapping considerations and contain complementary information,[123] so it

omitted) (emphasis added)); FED. FIN. INSTS. EXAMINATION COUNCIL, *supra* note 106 (recommending, but not requiring, banks to obtain ownership verification documents including trust instruments).

[118] *See generally* Amnon Lehavi, *Property and Secrecy*, 50 REAL PROP. TR. & EST. L.J. 381 (2016) (highlighting use of trustees and shell companies in real estate ownership).

[119] *See* Weisbord, *supra* note 33, at 93-94 (discussing lack of transparency in "Panama Papers" and impact of offshore trust abuses).

[120] *See id.* at 94 ("Offshore trust havens generally allow nonresident settlors to hide assets in secret trusts that are expressly immune from tax liens and liability judgments in the settlors' home countries.").

[121] *See* Tess Owen, *The VICE News Guide to the Panama Papers*, VICE NEWS (Apr. 5, 2016), http://news.vice.com/article/panama-papers-mossack-fonseca-leak-tax-haven-shellcompany-money-laundering [http://perma.cc/S3RH-BDN3].

[122] *See* 26 U.S.C. § 6103 (2012) (describing confidentiality and disclosure of tax returns and tax return information).

[123] *See* Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 922 (2012) (outlining advantages to integrating income tax and testamentary processes).

would be sensible for trust disclosure requirements to receive privacy protections comparable to those in the tax context.

A deep bench of tax scholars has argued that federal tax law, which imposes far more stringent government reporting requirements than trust law, is itself too protective of tax return privacy and that individual tax returns should be subject to public disclosure so as to hold the Internal Revenue Service ("IRS") accountable for its over- or under-enforcement of tax laws.[124] But full public disclosure of otherwise private trust information would seem unnecessary to protect the governmental interest in facilitating the investigation and enforcement of money laundering laws.[125] Only the government, not the public at large, requires access to this information.[126] However, if tax law reform were to move toward mandating full public disclosure for federal tax return information, then perhaps trust disclosure mandates should follow suit.

In the superlative case of President Trump's revocable trust, imposing a nonpublic disclosure and registration mandate would at least provide the government with access to information about the trust without the need for a civil action by Congress to obtain court-compelled discovery in litigation.[127] A due diligence and disclosure mandate under a nonpublic registry system would allow President Trump to maintain the same degree of privacy with respect to his trust as he enjoys with respect to the federal tax returns that he refuses to release.[128] The example of the Trump trust, however, may also reveal a need for more stringent trust disclosure requirements for individuals holding public office, a matter for scholars to address in that specialized field.

III. CONSERVATION AND ALLOCATION OF PUBLIC FINANCIAL RESOURCES

This Part examines the government's financial interest in conserving and allocating public resources. In particular, it identifies two features of state law

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[124] *See* Joshua D. Blank, *The Timing of Tax Transparency*, 90 S. CAL. L. REV. 449, 453 (2017) (noting scholars that "have advocated for public disclosure of some or all of individual taxpayers' annual tax returns in order to ensure that the IRS is pursuing adequate investigations and is 'free . . . from corrupting influences'").

[125] *Cf. id.* (explaining that tax transparency, which allows public to understand tax law and monitor IRS taxing authority, is likely unnecessary in realm of criminal law enforcement).

[126] *See id.* ("Today, nearly all tax returns are subject to extensive tax privacy protections that prohibit the federal government from publicly releasing any taxpayer's 'returns' or 'return information.'" (citation omitted)).

[127] *Cf.* Complaint at ¶ 18, Blumenthal v. Trump, No. 17-cv-01154, 2017 WL 2561946 (D.D.C. June 14, 2017) (alleging violations of Foreign Emoluments Clause by President Trump).

[128] *See* 26 U.S.C. § 6103 (2012) ("Returns and return information shall be confidential . . . ."); Complaint at ¶ 35, *Blumenthal*, No. 17-cv-01154 (noting how President Trump refused to release his tax returns).

that inadequately protect the government's stake in liens undermined by Medicaid and tax disclaimers.

By way of background, the state law of disclaimer provides notoriously inadequate protection for the recovery of government liens against heirs and beneficiaries with outstanding delinquencies.[129] State disclaimer laws allow an heir or beneficiary to renounce an inheritance by refusing to accept title to property received by intestacy, will, or trust.[130] The disclaimant is treated as having "died immediately before the time of distribution," so the disclaimed interest passes to the next eligible intestate heir or beneficiary named in the instrument.[131] An informed disclaimant typically ascertains the identity of the next eligible successor before deciding whether to disclaim because a disclaimant cannot select an alternative beneficiary—succession of the interest passes by operation of law.[132] Disclaimer law facilitates postmortem estate planning by allowing an heir or beneficiary to take stock of circumstances at the time of distribution and determine whether it is better for the family's estate plan to refuse the inheritance in favor of the next eligible taker.[133]

A common incentive favoring disclaimer is the "qualified disclaimer" exception under the federal gift tax.[134] This postmortem estate planning technique is attractive where the original heir or beneficiary plans to include the next eligible successor (typically one generation below) in her own estate plan because the gift tax treats a qualified disclaimer of inherited property as passing directly to that successor, thereby avoiding one level of federal transfer

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[129] *See generally* Hirsch, *supra* note 54, at 592-95 (describing state of disclaimer law with regard to donee's creditors).

[130] *See* UNIF. PROBATE CODE § 2-1106 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, amended 2010) (describing disclaimer of interest in property). In an *inter vivos* gift of property, by contrast, the donee's acceptance is a required element of a valid gift. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 6.1(b) (AM. LAW INST. 2003) ("Acceptance by the donee is required for a gift to become complete. Acceptance is presumed, subject to the donee's right to refuse or disclaim."). A donee who does not accept title to an *inter vivos* gift of property generally need not disclaim because the gift was never perfected. *See id.*

[131] *See* UNIF. PROBATE CODE § 2-1106(b)(3)(B) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, amended 2010).

[132] *See* Adam J. Hirsch, *The Code Breakers: How States Are Modifying the Uniform Disclaimer of Property Interests Act*, 46 REAL PROP. TR. & EST. L.J. 325, 326 (2011) (explaining that family members may disclaim in order to let gift pass to next generation); Hirsch, *supra* note 54, at 592-95 (describing passing of disclaimed gift by operation of law).

[133] *See* UNIF. PROBATE CODE § 2-801 cmt. (AM. LAW INST. 1969) ("This section [on renunciation of succession] is designed to facilitate renunciation in order to aid postmortem planning.").

[134] *See* 26 U.S.C. § 2518 (2012) (outlining qualified disclaimer provisions).

taxation.[135] A qualified disclaimer is not treated as a transfer subject to the gift tax because the disclaimant never accepted the inherited property or any of its benefits and, although the decision of whether to disclaim was made after the decedent's death, the disclaimer is treated as relating back to immediately before the time of distribution.[136] But for the disclaimer, the property interest would otherwise pass through the disclaimant's estate at death and would be subject to the estate tax at that time.[137]

Another common consideration favoring disclaimer is the desire to protect inherited assets from creditors of the original heir or beneficiary.[138] As in the case of qualified disclaimers, if the next eligible successor is a descendant or other close relative, then an heir or beneficiary with outstanding debts may prefer to disclaim because doing so typically allows the disclaimed interest to remain in the family while avoiding attachment by creditors.[139] The use of disclaimer for this purpose would seem to create the appearance of a fraudulent transfer—one made "with actual intent to hinder, delay, or defraud any creditor of the debtor; or without receiving a reasonably equivalent value in exchange for the transfer or obligation . . . ."[140] But in many states, an insolvent disclaimer is not a fraudulent transfer because a disclaimer is expressly defined as "not a transfer."[141] As Professor Adam J. Hirsch observes, "ironically, the [disclaimer

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[135] *See* Hirsch, *supra* note 132, at 326 ("[T]hose beneficiaries who are so rich that they can do without an inheritance may prefer that it go instead to family members of the next generation that occupy a lower income tax bracket, sometimes avoiding transfer taxes in the bargain.").

[136] *See* 26 U.S.C. § 2518(b)(3) (2012) ("[S]uch person has not accepted the interest or any of its benefits."); Hirsch, *supra* note 54, at 595 ("Because, in retrospect, the inheritance never vested in the debtor, no fraudulent transfer of the debtor's property can have occurred.").

[137] *Cf.* UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 13(f) cmt. (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, amended 2010) (explaining that where disclaimer fails, property passes to whomever would have received were disclaimer not barred and "the person attempting the disclaimer will bear any transfer tax consequences").

[138] *See* Hirsch, *supra* note 54, at 588-89.

[139] *See id.*

[140] *See* UNIF. VOIDABLE TRANSFERS ACT § 4(a)(1)-(2) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAW, amended 2014).

[141] *See* UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 5(f) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAW, amended 2010). For instance, the Uniform Disclaimer of Property Interests Act, adopted in eighteen states (along with the District of Columbia and U.S. Virgin Islands), imposes only a generic bar that incorporates by reference external limitations on disclaimer: "A disclaimer is barred or limited if so provided by law other than this [Act]." *Id.* § 13(e) (alteration in original). This language was, in part, intended to incorporate the creditor protections of fraudulent transfer law, but this provision fails to incorporate the fraudulent transfer protections because section 5(f) of the Act provides that "[a] disclaimer . . . is not a transfer." *Id.* § 5(f) cmt.

bar] fails to have the one consequence it was intended to have."[142] The legality of insolvent disclaimers has therefore generated enormous controversy, confusion, and non-uniformity of disclaimer rules across the states.[143] A large majority of states now permits insolvent disclaimers, while a handful limits or prohibits them altogether.[144]

Two contexts implicate the governmental interest in disclaimer law: (1) where the government provides public assistance (Medicaid, in particular) to a person who disclaims inherited property to preserve eligibility and (2) where a disclaimant has outstanding tax liens and disclaims for the purpose of insulating inherited assets from collection of tax delinquencies.[145] Disclaimers of these sorts interfere with the government's allocation and collection of public financial resources,[146] so the governmental interest favors mandatory restrictions on such government disclaimers.

Mandates restricting disclaimers in this regard would be minimally disruptive to existing law because they do not interfere with the substantive core of donative freedom: the donor's right to choose who gets what.[147] Constraining the power to disclaim does not override the choice of donors to allocate property; rather, it alters the consequences of a *donee's* choice to renounce. Although a donor, were she still alive, might agree with a donee's decision to disclaim given changed circumstances or better information, limiting disclaimer rights in deference to governmental interests would still carry out the donor's *actual* choice: to transfer property to the disclaimant named in the will or intestate heir.[148]

A. *Medicaid Disclaimers*

Medicaid disclaimers undermine the governmental interest in public resource allocation by enabling persons with access to private resources to claim public assistance benefits intended only for the needy.[149] Federal law allows states to

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[142] Hirsch, *supra* note 132, at 367.

[143] *See generally* Hirsch, *supra* note 54 (discussing conflicting cases and disparate treatment in state laws regarding disclaimers).

[144] *See* Hirsch, *supra* note 132, at 368 (highlighting few jurisdictions that bar insolvent disclaimers or protect certain creditors from disclaimers that would be adverse to creditor claims).

[145] *See generally* Adam J. Hirsch, *Disclaimers and Federalism*, 67 VAND. L. REV. 1871 (2014) (discussing these two contexts at length).

[146] *See* LaPiana, *supra* note 37, at 234 (describing trend in disclaimer law to protect public revenues).

[147] *Cf. supra* note 64 and accompanying text.

[148] *See* Hirsch, supra note 54, at 588 (describing how both act of donating and act of receiving are voluntary and law does not coerce either).

[149] *See* Hirsch, *supra* note 145, at 1898 ("The [Medicaid] program exists to benefit the 'truly needy,' not those who 'created their own need' . . . . If allowed to determine Medicaid

establish Medicaid eligibility criteria subject to federalized minimum standards,[150] but it does not expressly address the eligibility consequences of disclaiming an inheritance.[151] Most states have also failed to enact statutory rules governing the legality and consequences of Medicaid disclaimers, thereby leaving the matter for case-by-case resolution in the courts.[152] Most courts confronted with the issue have ruled against Medicaid eligibility in cases of Medicaid disclaimer.[153] A minority of courts have upheld Medicaid disclaimers as permissible and not contrary to public policy,[154] but following those cases, state legislatures enacted statutes overruling those decisions.[155]

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eligibility, disclaimers would impose an 'unnecessary burden' on taxpayers.") (alterations omitted); Timothy L. Takacs & David L. McGuffey, *Medicaid Planning: Can It Be Justified? Legal and Ethical Implications of Medicaid Planning*, 29 WM. MITCHELL L. REV. 111, 132-34 (2002) (noting eight policy objections to practice of Medicaid planning to preserve both personal assets and Medicaid eligibility).

[150] *See* 42 U.S.C. § 1396a(a)(17) (2012) (describing state's role in determing eligibility for and extent of medical assistance).

[151] Federal law specifically mandates that states take into account resources to which a person "is entitled to but does not receive because of [his or her own] action," but does not enumerate the actions that would trigger asset inclusion for Medicaid eligibility purposes. 42 U.S.C. § 1396p(h)(1) (2012).

[152] Hirsch, *supra* note 145, at 1898 (stating that as of publication, four states had enacted such statutes); *see also* Steven J. Hare & Nicole E. Manley, *State by State Treatment of Trusts and Disclaimers: Scope of Treatment*, *in* 2 ASSET PROTECTION: DOM. & INT'L L. & TACTICS § 14:47 (Westlaw 2018) (detailing fifty state survey of state disclaimer law).

[153] *See* Hirsch, *supra* note 145, at 1897 ("With few exceptions, state courts testing the issue, both before and since 1993, have judged disclaimers ineffective to render beneficiaries eligible for Medicaid.").

[154] *See, e.g.*, *In re* Estate of Kirk, 591 N.W.2d 630, 633 (Iowa 1999) ("The disclaimer provisions can . . . be utilized to frustrate the collection of Medicaid claims. Yet, we have repeatedly acknowledged beneficiaries may renounce property intended for their benefit even if the renunciation may effectively defeat claims of creditors."); Nielsen v. Cass Cty. Soc. Servs. Bd., 395 N.W.2d 157, 160 (N.D. 1986) ("By refusing to allow the Department to treat a renunciation . . . as a disqualifying act . . . , we are aware that the potential exists for individuals to refuse an inheritance or bequest which, absent the refusal, would be available to pay the costs of medical care for the renouncing party otherwise paid for by the Department.").

[155] *See* IOWA CODE § 249A.3 (2018) ("A disclaimer of any property, interest, or right pursuant to section 633.704 constitutes a transfer of assets for the purpose of determining eligibility for medical assistance in an amount equal to the value of the property, interest, or right disclaimed."); N.D. CENT. CODE. § 50-24.1-02 (1987) ("For the purposes of making any determination or redetermination of eligibility, the phrase 'assignment or transfer' includes actions or failures to act which effect a renunciation or disclaimer of any interest which the applicant or recipient might otherwise assert or have asserted, or which serve to reduce the amounts which an applicant or recipient might otherwise claim from a decedent's estate, a trust or similar device, or a person obligated by law to furnish support to the applicant or recipient.").

From the governmental interest perspective, states should be proactive in enacting mandatory rules that prohibit Medicaid disclaimers because allowing individuals with access to private resources increases the cost of a Medicaid program already threatened by the possibility of significant long-term budget cuts.[156] Given the strong trend toward disallowing Medicaid disclaimers in states that have chosen to address (or, more often, react to) this issue, it is perplexing that so many states would allow existing disclaimer statutes to remain silent on a matter of such compelling governmental interest. For reasons of expediency, therefore, Adam Hirsch proposes a federalized mandate prohibiting Medicaid disclaimers to prevent the matter from percolating endlessly through state legislatures and courts.[157] The need for such a federalized mandate, however, underscores the failure of state wealth transfer law to properly recognize the governmental interest.

In addition to asserting a more robust governmental interest, the enactment of mandatory disclaimer restrictions would benefit Medicaid recipients by providing greater clarity and notice of the adverse consequences of Medicaid disclaimers. In Georgia, for example, the disclaimer statute is silent on Medicaid disclaimers (as well as insolvent disclaimers),[158] and Georgia's Medicaid enabling statute summarily delegates the promulgation of Medicaid eligibility rules to the Georgia Department of Community Health.[159] The Department of Community Health, in turn, prohibits Medicaid disclaimers, but it buried this prohibition in a Medicaid policy manual.[160] In *Georgia Department of Community Health v. Medders*,[161] an elderly widow confined to a nursing home disclaimed inheritance from her deceased spouse and then later applied for Medicaid to cover the cost of her nursing home care.[162] Citing its policy manual, the Georgia health agency denied Medicaid coverage because the widow had

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[156] *See, e.g.*, David Leonhardt, Opinion, *Goodbye, Medicaid*, N.Y. TIMES (June 23, 2017), https://www.nytimes.com/2017/06/23/opinion/medicaid-health-care.html?_r=0 (discussing Senate's gutting of Medicaid in new health care bill).

[157] Hirsch, *supra* note 145, at 1897-98.

[158] *See* GA. CODE ANN. § 53-1-20 (2018) (outlining procedure for persons to renounce property).

[159] *See* GA. CODE ANN. § 49-4-142(a) (2018) ("The department is authorized to establish the amount, duration, scope, and terms and conditions of eligibility for and receipt of such medical assistance as it may elect to authorize pursuant to this article.").

[160] *See* Ga. Dep't of Cmty. Health v. Medders, 664 S.E.2d 832, 834 (Ga. Ct. App. 2008) ("DCH thus promulgated a policy manual for the Medicaid program. Among other things, the manual establishes a transfer-of-resource penalty for a Medicaid applicant who 'gives away or sells a resource for less than [current market value], or *refuses an inheritance*, during the 36 month look back period or anytime thereafter.'").

[161] *Id.*

[162] *Id.* at 833.

disclaimed; the Georgia Court of Appeals upheld the agency's denial.[163] This outcome left the widow both without an inheritance from her deceased spouse (qualified disclaimers are irrevocable) and without Medicaid coverage to offset the high cost of nursing home care.[164]

Beyond the disclaimer law context, there may also come a time when Congress might choose to reevaluate the policy of allowing donors to engage in Medicaid eligibility planning in ways that avoid the disclaimer problems in advance of an inheritance or *inter vivos* transfer. Under the Omnibus Budget Reconciliation Act of 1993, Congress authorized the use of third-party supplemental needs trusts that allow for certain beneficial distributions that do not count toward the beneficiary's Medicaid eligibility.[165] This exemption creates incentives for donors to provide resources for disabled beneficiaries that are not otherwise covered by Medicaid, but, at the same time, it also facilitates access to Medicaid for individuals with family resources that could be used in place of governmental assistance.[166] A future empirical study might reveal whether the incentives created by the exemption of supplemental needs trusts from Medicaid eligibility are in fact serving the purposes intended by Congress.

B. *Tax Lien Disclaimers*

Tax lien disclaimers undermine the government's financial interest by allowing disclaimants to protect inherited property from tax collection.[167] Most state disclaimer statutes not only permit insolvent disclaimers, as noted above, but they treat the government as an ordinary creditor for purposes of government claims (including tax liens) by failing to grant the State the status of an exception creditor.[168] Thus, state disclaimer laws in most jurisdictions permit an individual

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[163] *Id.* at 833-34 ("We must defer to the agency's reasonable conclusion that, under applicable Medicaid regulations, a renounced inheritance constitutes an asset that has been disposed of or given away, triggering the transfer-of-resource penalty.").

[164] *See id.* at 833.

[165] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13611(b), 107 Stat. 622, 625 (codified at 42 U.S.C. § 1396p(d)(4)(A) (2012)) (providing exception for trust of assets of disabled individuals under sixty-five).

[166] *See, e.g.*, *In re* Riddell, 157 P.3d 888, 893 (Wash. Ct. App. 2007) ("Special needs trusts were created in order to allow disabled persons to continue receiving governmental assistance for their medical care, while allowing extra funds for assistance the government did not provide.").

[167] *Cf.* Drye Family 1995 Tr. v. United States, 152 F.3d 892, 899 (8th Cir. 1998), *aff'd sub nom.* Drye v. United States, 528 U.S. 49 (1999) ("[H]olding that state law disclaimers can defeat federal tax liability ignores the clear intent of Congress . . . to reach any and all interests of pecuniary value to which a taxpayer may be entitled in order to satisfy outstanding tax liability.").

[168] For example, the Uniform Disclaimer of Property Interests Act section 13(e) states only that "A disclaimer is barred or limited if so provided by law other than this [Act]," language that fails to protect creditors under fraudulent transfer doctrines because the uniform law

with unpaid tax liens to validly disclaim an interest in property for the purpose of shielding inherited assets from tax collection.[169] But the failure of state law disclaimer statutes to protect the governmental interest in tax collection in turn has forced federal courts to find ways to override state wealth transfer law.

Federal statutory law does not specifically address the legality of tax lien disclaimers.[170] Rather, the question is governed by general statutory provisions that authorize the government to impose tax liens.[171] The Internal Revenue Code provides that outstanding tax liabilities are automatically deemed to be "a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."[172] The statute does not define "property" or "rights to property," so the Supreme Court has held that federal law absorbs state law definitions of property rights to determine whether an interest constitutes property and, therefore, falls within the scope of a lien.[173]

Although the power to disclaim may in fact be of great economic value to the disclaimant's family, the legal definition of disclaimer complicates its character as property or a right to property.[174] Recall that under most state laws, disclaimer relates back to the moment immediately before the interest was created (typically the transferor's death) and that as a result a disclaimant is treated as never having owned the disclaimed property.[175] The legal fiction of treating the disclaimant as predeceasing the donor removes the disclaimant entirely from the

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defines a disclaimer as not a transfer. UNIF. DISCLAIMER OF PROP. INTERESTS ACT §§ 5(f), 13(e) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, amended 2010). By contrast, in the context of spendthrift trusts, the Uniform Trust Code grants the government the status of an exception creditor by treating spendthrift protection as unenforceable against "a claim of this State or the United States to the extent a statute of this State or federal law so provides." UNIF. TR. CODE § 503(b)(3) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, amended 2010).

[169] For example, the Arkansas statute discussed in *Drye Family 1995 Tr. v. United States* would have allowed the beneficiary to disclaim notwithstanding the tax lien. *See Drye Family 1995 Tr.*, 152 F.3d at 893 (describing how Drye was able to effect valid disclaimer despite IRS tax liens on property).

[170] *See* Hirsch, *supra* note 145, at 1886 (noting that section 6321 of Internal Revenue Code "makes no mention whatsoever of disclaimers").

[171] *See, e.g.*, 26 U.S.C. § 6321 (2012) (authorizing United States to place lien on persons liable for taxes).

[172] *Id.*

[173] Aquilino v. United States, 363 U.S. 509, 512-13 (1960) (noting that federal and state courts must use state law to determine "nature of the legal interest").

[174] For an illustration of this complication in the Medicaid context, see Hirsch, *supra* note 54, at 601-03 (describing how in Medicaid context, court's application of disclaimers creates illogical conclusion).

[175] UNIF. PROBATE CODE § 2-1106(b)(3) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, amended 2010) (describing disclaimers as existing in moment before interest was created, thus resulting in disclaimant never having owned disclaimed property).

transfer of title.[176] It would therefore seem that a federal tax lien could not attach to a disclaimed property interest because the interest was never property belonging to the disclaimant. But this reading of the law would allow disclaimers to function as a state law loophole around the federal tax lien mandate. As Hirsch explains, "Any rule of disclaimer, creating a right to decline gratuitous transfers of property, represents a structural characteristic of property. Simultaneously, though, that characteristic can function to thwart creditors' claims, no less effectively than an express right of exemption from levy."[177]

Presented with this conflict, a unanimous Supreme Court held in *Drye v. United States*[178] that the right to disclaim was itself a valuable right to property within the scope of the tax lien statute.[179] The Court reasoned that, by disclaiming, a disclaimant acquires "dominion" over "the right either to inherit or to channel the inheritance to a close family member (the next lineal descendant)."[180] The Court's decision solved the problem created by state disclaimer law's failure to protect the governmental interest in tax collection, but it did so by making a doctrinal mess of disclaimer law. Hirsch identifies several flaws in the Court's analysis, including its inconsistent treatment of disclaimers for tax lien purposes as compared to gift tax purposes: Under *Drye*, the power to disclaim constitutes a right to property because it gives the disclaimant dominion over a valuable interest, but under the federal gift tax,[181] a qualified disclaimer is not subject to the gift tax because it is treated "as if the interest had never been transferred to such person."[182] Hirsch asks, "Why, then, does the disclaimant's degree of dominion applicable to the collection of back taxes differ from the degree of dominion applicable to the assessment of front taxes?"[183]

Drye's assertion of the governmental interest in overriding state disclaimer law in cases where the disclaimant has an outstanding tax delinquency was not only clumsy but incomplete. As Hirsch points out, *Drye* came close to, but fell short of, addressing the more difficult question of whether federal law should regulate the testator's freedom to disinherit an heir with outstanding tax

[176] *See id.* (explaining that heir cannot use disclaimer to effect change in division of intestate's estate).

[177] Hirsch, *supra* note 145, at 1889.

[178] 528 U.S. 49 (1999).

[179] *Id.* at 60-61 ("A donee who declines an *inter vivos* gift generally restores the status quo *ante*, leaving the donor to do with the gift what she will.").

[180] *Id.* ("In sum, in determining whether a federal taxpayer's state-law rights constitute 'property' or 'rights to property,' '[t]he important consideration is the breadth of the control the [taxpayer] could exercise over the property.'").

[181] 26 U.S.C. § 2518 (2012).

[182] *Id.* (explaining that power with respect to property shall be treated as interest in such property); *see* Hirsch, *supra* note 145, at 1893.

[183] Hirsch, *supra* note 145, at 1893.

delinquencies–an estate planning choice that would circumvent the governmental interest in tax collection without the intermediate step of disclaimer.[184] Thus, the original sin lies not in the Supreme Court's problematic resolution of the conflict between federal tax law and state law disclaimer statutes. Rather, the source of regulatory debacle lies in the deficiencies of under-regulated *state* law that created the problem in the first place. Had state law disclaimer statutes recognized the governmental interest in tax collection by granting the government exception-creditor status and allowing it to set aside tax lien disclaimers, the matter never would have reached the Supreme Court.

IV. Efficiency in the Administration of Justice

This Part examines the governmental stake in pursuing efficiency in the administration of justice. One of the core functions of government is to establish and maintain a judicial system for adjudicating legal disputes.[185] In a society wherein litigation has become a common form of dispute resolution, however, the conservation of public resources necessary to fund the judicial branch furthers the governmental interest in reducing its burdens on the tax base that subsidizes the cost of private litigation. Thus, the governmental interest in maximizing efficiency in the administration of justice favors out-of-court resolution of private disputes where possible and procedural measures that reduce the overall consumption of judicial resources in any given proceeding.

At the outset, however, this account of judicial efficiency must be understood as a means of responsible governance rather than an end in itself. In theory, the State could achieve judicial efficiency in the extreme by conserving *all* resources allocated to the judicial branch and abdicating the government's role in adjudicating legal disputes, thereby leaving parties to fend for themselves in settling matters of private conflict. However, such an absurd pursuit of judicial deconstruction would inhibit socially beneficial economic activity and the accumulation of wealth generated by society's reliance on the stability and certainty afforded by a well-functioning judiciary. Thus, the governmental interest in promoting efficiency in the administration of justice justifies neither wholesale privatization of the judicial function nor the downsizing of courts in the name of fiscal austerity. Rather, the governmental interest in judicial efficiency implies only that the burdens of litigation on the court system should be considered and minimized in appropriate contexts.

Two aspects of wealth transfer law appear to undermine this governmental interest by overriding donative preferences that would otherwise conserve and economize judicial resources: (1) mandatory rules requiring the admissibility of extrinsic evidence and invocation of the court's reformation power, both of which preclude testators and trust settlors from confining the interpretation of a governing instrument to its four corners; and (2) protective doctrines that

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[184] *Id.* at 1894 ("Drye's mother is spinning in her grave at the outcome of this case.").

[185] *See, e.g.*, U.S. CONST. art. III, § 1 (recognizing "judicial power of the United States" and vesting it in courts).

invalidate or limit the enforcement of "no-contest" and testamentary arbitration clauses that prevent estate disputes from litigation in court.

A. *Reformation and the Admissibility of Extrinsic Evidence*

Under the traditional plain meaning rule, courts construing a will could not admit extrinsic evidence in the absence of a latent ambiguity or reform a will to correct mistaken language.[186] Similarly, Dead Man's Statutes categorically prohibited the testimony of an interested witness in claims against a decedent's estate.[187] Recent reforms promulgated by the Uniform Probate and Trust Codes modify both doctrines by admitting extrinsic evidence and also authorizing courts to reform unambiguous language "affected by mistake of fact or law" if proven by clear and convincing extrinsic evidence of donor intent.[188] But, as explained below, these reforms do not merely authorize reformation; indeed, they also render the court's authority *mandatory* to invoke (but not necessarily to act upon) its equitable powers under those doctrines such that donors may not choose to opt out of the remedy.[189] On the whole, the reforms represent a vast

[186] *See* Fred Franke & Anna Katherine Moody, *The Terms of the Trust: Extrinsic Evidence of Settlor Intent*, 40 ACTEC L.J. 1, 5 (2014) ("The plain meaning rule requires that a testator's donative intent be found strictly from the language used in a will regardless of the certainty derived from extrinsic evidence that such language misstates the testator's actual intent."); John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521, 521 (1982) (explaining that under plain meaning rule, courts will not correct mistaken expressions of intent) (citing GEORGE E. PALMER, THE LAW OF RESTITUTION § 20.1, at 158 (1978)) (explaining that wills will not be reformed for mistakes in expression of intent).

[187] *See* Ed Wallis, *An Outdated Form of Evidentiary Law: A Survey of Dead Man's Statutes and A Proposal for Change*, 53 CLEV. ST. L. REV. 75, 75-76 (2005) ("A surviving form of common law, a Dead Man's statute is a law prohibiting the admission of a decedent's statement as evidence in certain circumstances.").

[188] *See* UNIF. PROBATE CODE § 2-805 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, amended 2010); UNIF. TRUST CODE § 415 (UNIF. LAW COMM'N, amended 2010); RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 12.1(2) (AM. LAW INST. 2003). New Jersey arguably has gone the furthest in this direction with its doctrine of probable intent. N.J. REV. STAT. § 3B:3-33.1 (2018) ("The intention of a testator as expressed in his will controls the legal effect of his dispositions . . . unless the probable intention of the testator, as indicated by the will and relevant circumstances, is contrary."). Hirsch argues that the plain meaning rule remains alive in jurisdictions that have enacted the reformation doctrine because the latter doctrine continues to bar extrinsic evidence in the absence of a mistake of fact or law, even as some courts have stretched the concept of "mistake" too far when invoking reformation as a remedy for language that was not mistaken at the time of execution. Adam J. Hirsch, *Defective Catastrophe Clauses in Wills: Paths to Reform*, 52 REAL PROP., TR. & EST. L.J. 239, 343-49 & n.44 (2018).

[189] *See* Adam J. Hirsch, *Testation and the Mind*, 74 WASH. & LEE L. REV. 285, 319 (2017) ("Under the model laws, relief for mistake operates as a mandatory rule, not as a default rule.").

improvement because extrinsic evidence and reformation powers are sometimes necessary to effectuate donor intent accurately, particularly in cases of ambiguous language, mistaken terms, and scrivener's error.[190]

From the perspective of donative freedom, however, these reforms appear to overreach because they operate by mandate rather than default.[191] Because donors have no choice in whether to vest a court with such powers, these mandates can override the intent of donors who prefer to bar consideration of extrinsic evidence or insulate a donative instrument from reformation at the request of a party seeking to interfere posthumously with donative intent.[192] A

[190] *See, e.g.*, Jane B. Baron, *Irresolute Testators, Clear and Convincing Wills Law*, 73 WASH. & LEE L. REV. 3, 64 (2016) ("The . . . mistake-correction reforms . . . are not meant to change the requirements for a valid will, but simply provide a mechanism to prevent meaningless blunders from defeating a testator's convincingly evidenced intent.").

[191] *See* UNIF. TRUST CODE § 105 cmt. (UNIF. LAW COMM'N, amended 2010) ("The power of the court to modify or terminate a trust under Sections 410 through 416 is not subject to variation in the terms of the trust."); Hirsch, *supra* note 189, at 319 ("Under the model laws, relief for mistake operates as a mandatory rule, not as a default rule."). As Professor Champine explains, the uniform laws' reformation rules do not "permit careful testators to preclude litigation over intent and protect against the possibility that intent will be discerned inaccurately based on extrinsic evidence that is outside their control." Pamela R. Champine, *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 NEB. L. REV. 387, 389 (2001); *see also* Hirsch, *supra* note 189, at 319 ("This [mandatory] attribute belies the premise that reformation functions to effectuate the intent of the testator."); *cf.* Hirsch, *supra* note 3, at 2249 (arguing that analogous, and similarly mandatory, rule of trust modification "should also take the form of a default rule"). The Third Restatement of Trusts section 21 comment (a) states that, "[u]nder the parol-evidence rule, where the manifestation of the settlor's intention is integrated in a writing, that is, if a written instrument is adopted by the settlor as the complete expression of the settlor's intention, extrinsic evidence is not admissible to contradict or vary the terms of that instrument in the absence of fraud, duress, undue influence, mistake, or other ground for reformation or rescission." RESTATEMENT (THIRD) OF TRUSTS § 21 cmt. a (AM. LAW. INST. 2003). The rule, however, is expressly predicated on "the absence of fraud, duress, undue influence, mistake, or other ground for reformation." *Id.* § 21(1). The comment explains that the court's reformation power, therefore, "should have a less inhibiting effect [on barring extrinsic evidence under the parole evidence rule] than might initially appear." *Id.* § 21 cmt. a.

[192] As Champine explains:

> The burden of assuring that a challenge to an accurate will is unsuccessful requires the testator to control any and all extrinsic evidence of intent that may come before the court after his death. To attempt to satisfy this burden, the testator who is concerned about an intent-defeating reformation might feel compelled to explain his reasons for dispositive choices that he would prefer to keep private; to limit conversations with family and friends about estate planning in order to limit the possibility of misunderstandings that could create a belief reformation was appropriate; and to generate additional supporting documentation reinforcing his clearly stated wishes. These steps are not only undesirable but also insufficient to achieve the purpose of insulating a will from an intent-defeating reformation. The testator can control neither the evidence litigants choose to place before the court after his death nor the manner in which the court perceives it, and therefore he

donor, for example, may anticipate the assertion of frivolous claims against her estate, so an ex ante and explicit decision to bar extrinsic evidence and reformation could spare the cost, uncertainty, and unreliability of providing a judicial forum for such unfounded claims.[193] Further, by precluding donors from opting out, the extrinsic evidence and reformation mandates can increase the cost of prudent estate planning by creating a need to fortify donative intent with additional evidence and drafting considerations.[194] Significantly, neither the Uniform Probate Code ("UPC") nor the Uniform Trust Code fully explains the basis for imposing these doctrines by mandate rather than default.[195] The UPC also appears to cloak its mandate under the cover of implied rather than express statutory language.[196]

> cedes some of his authority to express testamentary wishes to those who are interested in disposition of his estate.

Champine, *supra* note 191, at 437; *cf. In re* Estate of Payne, 895 A.2d 428, 434-36 (N.J. 2006) (applying New Jersey's doctrine of probable intent and relying on letter testator wrote to his lawyer to determine testator's intent).

[193] As Professor Wayne Gazur explains:

> Unfounded claims impose a cost on estate administration in terms of litigation and settlements. Professor Sherwin has argued with respect to will formalities that "[a]ttaching a clear and convincing evidence standard to a dispensation statute . . . does not contain the volume of litigation." If that is also true of reformation proceedings, then opening wills to the possible admission of more extrinsic evidence can only add to estate litigation. Sadly, the careful testator would need to establish the proof of a negative, and the well-advised testator may need to take extra measures to establish that proof. Extra measures, particularly those involving attorneys, impose additional costs in terms of fees and time.

Wayne M. Gazur, Coming to Terms with the Uniform Probate Code's Reformation of Wills, 64 S.C. L. REV. 403, 420 (2012).

[194] *See id.* ("Extra measures, particularly those involving attorneys, impose additional costs in terms of fees and time.").

[195] The comment to Uniform Trust Code section 105(b) explains that settlors can avoid the court's mandatory invocation of modification and termination doctrines through careful estate planning and draftsmanship:

> The power of the court to modify or terminate a trust under Sections 410 through 416 is not subject to variation in the terms of the trust. Subsection b(4). However, all of these Code sections involve situations which the settlor could have addressed had the settlor had sufficient foresight. These include situations where the purpose of the trust has been achieved, a mistake was made in the trust's creation, or circumstances have arisen that were not anticipated by the settlor.

UNIF. TRUST CODE § 105 cmt. (UNIF. LAW COMM'N, amended 2010).

[196] Under the UPC, all of the other generally applicable rules of construction are default rules expressly governed by safe harbors that yield to a donor's contrary intent. *See* UNIF. PROBATE CODE § 2-601 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, amended 2010) ("In the absence of a finding of a contrary intention, the rules of construction in this [part] control the construction of a will." (alteration in original)); *id.* § 2-701 ("In the absence of a finding of a contrary intention, the rules of construction in this [part] control the construction of a governing instrument." (alteration in original)). By contrast, the UPC's

Proponents of these reforms may argue that the extrinsic evidence and reformation mandates serve an intent-fulfilling function (notwithstanding contrary donor instructions) by providing a release valve for the finality effect of death on donative instruments, which in many cases are drafted long before the donor dies.[197] The transmission of property at death is inherently forward-looking (hence, the term "estate *planning*") because, at the time of estate administration, the deceased donor herself can no longer respond to changed circumstances or newly discovered material information.[198] The donor's procedural preferences are therefore formed and fixed in advance without knowledge of how they will apply to a particular disputed matter in future litigation and without the ability to reconsider the wisdom of such choices at the time of suit.[199] By contrast, a donor who manifests intent to bar extrinsic evidence and reformation must assume the risk at the time of drafting that her choice will later turn out to be unsuitable given the specific issues that may arise

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reformation doctrine omits, without explanation, the safe harbor allowing donors to opt out. *See* UNIF. PROBATE CODE § 2-805 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, amended 2010) ("The court may reform the terms of a governing instrument, even if unambiguous, to conform the terms to the transferor's intention if it is proved by clear and convincing evidence what the transferor's intention was and that the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement."). As Professor Pamela Champine explains:

> The most fundamental of all changes in the law of wills is the re-interpretation of the Statute of Wills to accommodate reformation of wills on the grounds of mistake which does not incorporate such a safe harbor. The historic approach provided a safe harbor by demanding absolute deference to the testator's wishes as written, foreclosing any opportunity to reform a will based on an alleged mistake. The liberalized approach to reformation, adopted by the Third Restatement of the Law of Property (Donative Transfers), the Third Restatement of Trusts, the Uniform Trust Code and at least one state legislature, provides none. Instead, it permits re-writing of wills whenever the fact finder concludes there is clear and convincing evidence that the will does not embody the testator's actual dispositive wishes.

Champine, *supra* note 191, at 389-90.

[197] *See, e.g.*, Langbein, *supra* note 3, at 1110-11 ("[D]uring his or her lifetime, the settlor has unfettered discretion as owner for the property, to impose such conditions on an inter vivos gift. The owner who is competent to transfer property in trust would also be competent to do with the property the various things that the courts have refused to enforce as trust terms . . . .").

[198] *See id.* at 1117 (explaining that UPC allows courts to modify trust if circumstances not anticipated by settlor, and that modification or termination will further purposes of trust).

[199] *Cf.* RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. i (AM. LAW. INST. 2003) ("[T]he 'rigor mortis' of deadhand control is not present while a property owner is able to respond to persuasion and evolving circumstances."); Langbein, *supra* note 3, at 1111 ("The living donor can always change his or her mind, as he or she observes the consequences of an unwise course of conduct, or as other circumstances change, but the settlor who is deceased . . . cannot.").

in a future dispute.[200] The mandatory modification and trust termination rules, perhaps paternalistically, prevent donors from interfering with a court's power to address undiscovered mistakes and unanticipated contingencies after the donor's death.[201]

Professor John Langbein explains that, in addition to serving an intent-fulfilling purpose, the mandatory modification rules of trust law restrain deadhand control to prevent the creation of trusts that confer no benefits on beneficiaries or impose negative externalities on the living.[202] The requirement that a trust benefit the beneficiary, however, relates more closely to modification doctrines that address changed circumstances than settlor preferences regarding the regulation of admissible evidence and rules of interpretation.[203]

The extrinsic evidence and reformation mandates of wealth transfer law differ from their counterpart doctrines in contract law, which generally enforce merger clauses in which the parties agree to integrate all terms into a written contract and abide by a court's interpretation without extrinsic evidence.[204] Contract law

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[200] For an illustration of such a change of circumstances, see Langbein, *supra* note 3, at 1111-12 (explaining anti-deadhand principle as change-of-circumstances doctrine).

[201] Professor David English, reporter for the Uniform Trust Code, explains that most jurisdictions now permit trusts of very long duration, so mandatory trust modification doctrines provide the necessary flexibility to respond to changing circumstances over time. *See* David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 169 (2002) ("Due to the increasing use in recent years of long-term trusts, there is a need for greater flexibility in the restrictive rules that apply concerning when a trust may be terminated or modified other than as provided in the instrument.").

[202] *See* Langbein, *supra* note 3, at 1108 ("[C]ourts have prevented a settlor from ordering her house bricked up or refused to enforce trust terms calling for the erection of heroic statues of the settlor."); *see also* RESTATEMENT (THIRD) OF TRUSTS § 66 cmt. a, b (AM. LAW. INST. 2003) (restraining deadhand statutes). Other trust law mandates, such as limitations on waiver of fiduciary duties, protect settlors from imposing restrictions that ultimately undermine the trust's purposes. *See* Langbein, *supra* note 3, at 1124 ("The good faith requirement is mandatory . . . . A trust whose terms authorize bad faith performance, like a trust that denies enforceable duties, would be illusory.").

[203] *Compare* English, *supra* note 201, at 169 (discussing modification doctrines of trusts as response to use of long-term trusts), *with* Champine, *supra* note 191, at 437 (discussing challenge of testator to prevent admission of extrinsic evidence regardless of changes in circumstance).

[204] *Compare* UNIF. TRUST CODE § 105 cmt. (UNIF. LAW COMM'N, amended 2010) ("The power of the court to modify or terminate a trust under Sections 410 through 416 is not subject to variation in the terms of the trust."), *with* RESTATEMENT (SECOND) OF CONTRACTS § 213(1) (AM. LAW INST. 1981) ("A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them."). Further, in some jurisdictions, the extrinsic evidence and reformation rules apply differently to trusts and wills. *See, e.g.*, *In re* Estate of Robinson, 720 So. 2d 540, 541 n.1, 542 (Fla. Dist. Ct. App. 1998) (invoking court's "duty" to grant reformation to correct mistaken term in trust while noting that "Florida courts have held that neither a mistake in the inducement nor a mistake in the contents is sufficient to invalidate a

scholars argue that the law's respect for party sovereignty requires deference not only to the parties' selection of contractual terms, but also to their chosen interpretative rules for enforcing substantive terms.[205] The enforcement of integration clauses can also encourage parties to draft contracts with language that has a commonly understood meaning.[206] Such language is easier for courts to interpret because it does not require inquiry into a party's subjective intent.[207] By contrast, integration clauses are not recognized under the law of donative transfers and, as a practical matter, are not generally (if ever) included in donative instruments.[208] One possible (if not likely) reason for this difference between contract and wealth transfer law is the failure of lawmakers to coordinate their reform efforts.[209]

The contract law doctrine of reformation also departs substantively (albeit slightly) from its wealth transfer law counterparts. Under contract law,

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will"). The UPC, however, does attempt to address the inconsistency of rules between wills and nonprobate instruments—UPC section 2-805 applies reformation to all governing instruments, a term that includes wills and nonprobate transfers. *See* UNIF. PROBATE CODE § 2-805 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, amended 2010); *id.* § 1-201(18) (defining term "governing instrument" as "a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), transfer on death (TOD) deed, pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type").

[205] *See, e.g.*, Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 589-90 (2003) ("Our analysis thus supports the conclusion that courts should interpret business contracts on minimal evidentiary bases whether the issue is what the contract language means or what language the contract was written in, unless parties explicitly instruct the court otherwise.").

[206] *See id.* (explaining that enforcement of contract terms will improve drafting language).

[207] *See id.* ("By adopting the merger clause, therefore, the parties signal to the court that this incentive has motivated them to speak in majority talk."). Courts, however, are split on whether to apply an exception to the parol evidence rule in cases of scrivener's error, which by definition are limited to clerical errors, not mistake as to fact or law. *See* Mark K. Glasser & Keith A. Rowley, *On Parol: The Construction and Interpretation of Written Agreements and the Role of Extrinsic Evidence in Contract Litigation*, 49 BAYLOR L. REV. 657, 735 (1997).

[208] In a sample of 230 wills probated in Sussex County, New Jersey in 2015 (on file with author), none of the wills included an integration clause precluding the admissibility of extrinsic evidence.

[209] *See* Hirsch, *supra* note 3, at 2250-51 ("That lawmakers have allowed the paths of [contract and wills] laws nonetheless to diverge has a ready, and by now predictable, explanation: neither the Uniform Trust Code nor the third Restatement of Trusts ever once cites to contract doctrines of modification by way of comparison. . . . [E]xisting rules of contracts and wills betray troubling inconsistencies between parallel doctrines and, what is worse, contradictions at points of intersection where the rules sometimes operate at cross-purposes. Lawmakers need to confront these anomalies.").

reformation to correct a mistaken term is generally available only when justified by the existence of a mutual, not unilateral, mistake.[210] Under the general rule, reformation is *not* the appropriate form of relief for unilateral mistake. In that case, the more limited remedy of rescission is appropriate only when the mistaken party is deemed not to have assumed the risk of mistake and the effect of enforcing the unilateral mistake would be unconscionable, or the non-mistaken party had reason to know of or caused the mistake.[211] Reformation does not provide relief for unilateral mistake because the reformed terms would impose upon the non-mistaken party a contract to which that party never agreed.[212] Indeed, this aspect of contract law reformation is consistent with its wealth transfer law counterparts because, unlike contracts, donative transfers do not require mutual assent, so reformation would not impose terms upon a beneficiary to which that beneficiary never agreed.[213]

But there *is* one context in which contract law reformation may be invoked to correct unilateral mistake: a court may reform certain contracts, such as a promise under seal to make a gift[214]—a context that is almost indistinguishable from a donative transfer so long as the promisor remains alive. As the Restatement (Second) of Contracts explains, "since the intention of only one party is involved, his mistake alone will entitle him to reformation, at least if there has been no reliance by the donee that cannot be compensated for."[215]

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[210] *See* RESTATEMENT (SECOND) OF CONTRACTS § 155 (AM. LAW INST. 1981) ("Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of *a mistake of both parties* as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement, except to the extent that rights of third parties such as good faith purchasers for value will be unfairly affected." (emphasis added)).

[211] *See id.* § 153 ("Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him . . . .").

[212] *Cf. id.* at cmt. b (explaining situations in which rule applies and noting that it should not apply where misunderstanding prevents mutual assent).

[213] A non-consenting beneficiary may, of course, disclaim the interest, but the original transfer remains valid to the extent it names a contingent taker willing to accept the gift. *See supra* notes 154-158 and accompanying text.

[214] Although promises under seal are mentioned in the Second Restatement of Contracts, RESTATEMENT (SECOND) OF CONTRACTS § 155 cmt. b (AM. LAW. INST. 1981), most states, as well as Article 2 of the Uniform Commercial Code, have since abolished seal as a substitute for consideration. U.C.C. § 2-203 (AM. LAW INST. & UNIF. LAW COMM'N 1992) (explaining that affixing seal to writing evidencing contract does not constitute sealed instrument); *see* Eric Mills Holmes, *Stature and Status of A Promise Under Seal as A Legal Formality*, 29 WILLAMETTE L. REV. 617, 637-38 (1993) ("The great majority of American jurisdictions have changed the common law of sealed instruments . . . .").

[215] RESTATEMENT (SECOND) OF CONTRACTS § 155 cmt. b (AM. LAW INST. 1981) ("In the case of a promise under seal to make a gift, since the intention of only one party is involved,

Reformation under contract law, however, is available only to the promisor (the donor), not the promisee (the donee), because "equity will not ordinarily aid a volunteer."[216]

It is here where the reformation doctrines of contract and wealth transfer law differ. In a will or other donative transfer involving a deceased donor, it is almost invariably the donee who seeks to invoke the court's reformation power to correct a mistake.[217] And unlike the contract law reformation doctrine, which limits such relief to the promisor to the exclusion of the promisee in the most analogous context of promises to make a gift (where still enforceable as a contract), the wealth transfer law reformation doctrines allow the donee to seek reformation for the purpose (or under the guise, depending on one's perspective) of carrying out the donor's actual intent because the donor is no longer available to clarify her intent.[218]

Hirsch, opining on the mandatory character of trust modification and termination rules,[219] argues further that such mandates stand in contrast with the default nature of contract law's analogue doctrine of supervening frustration.[220] Hirsch, therefore, questions why contractual parties should be permitted to assume the risk of a supervening event by opting out of the court's modification power, but the settlor of a trust who chooses to engage in "considered intransigence" (failing to expressly address future contingencies while also purporting to prohibit courts from invoking the modification and termination doctrines) cannot.[221] Citing this inconsistency, he contends that the Uniform

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his mistake alone will entitle him to reformation, at least if there has been no reliance by the donee that cannot be compensated for.").

[216] *Id.* § 155 cmt. d (AM. LAW INST. 1981) ("[E]quity will not ordinarily aid a volunteer, and it is for this reason that the promisee of a promise under seal to make a gift is generally barred from obtaining reformation.").

[217] *See, e.g.*, *In re* Estate of Robinson, 720 So. 2d 540, 540 (Fla. Dist. Ct. App. 1998) (involving trust beneficiary filing suit to reform mistake).

[218] *Compare* RESTATEMENT (SECOND) OF CONTRACTS § 155 cmt. d (AM. LAW INST. 1981), *with* UNIF. PROBATE CODE § 2-805 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, amended 2010).

[219] UNIF. TRUST CODE §§ 410-416 (UNIF. LAW COMM'N, amended 2010) (explaining modification or termination of trust terms based on various circumstances).

[220] *See* Hirsch, *supra* note 3, at 2247 (critiquing mandates as unnecessarily rigid when compared to contracts); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 265 (AM. LAW INST. 1981) ("Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, *unless the language or the circumstances indicate the contrary*." (emphasis added)).

[221] *See* Hirsch, *supra* note 3, at 2247-48.

Trust Code's regulation of trust modification by mandate rather than default "expos[es] the intent-effectuating rationale for modification as a fiction."[222]

Hirsch also cautions against overreliance on the decedent's unavailability in justifying broader limits on dispositional freedom:

> On this basis, we could justify amending any estate plan that the testator declined to divulge to beneficiaries during his or her lifetime. Once again, those beneficiaries will have had no opportunity to state their case for redividing the estate, and after the will comes to light in probate the testator can no longer "change his or her mind." Such a doctrine would destroy all but a remnant of freedom of testation, which no one is advocating.[223]

Hirsch's views align with scholars who criticize other areas of the law for attaching disproportionately significant legal consequences to the death of a person.[224]

For our purposes, the extrinsic evidence and reformation mandates are also noticeably out of sync with governmental interests favoring the conservation of judicial resources and efficiencies in the administration of justice. Courts receive the majority of their funding from tax revenues (supplemented only nominally by court fees paid by litigants), so the governmental interest generally favors the conservation of judicial resources.[225] But the extrinsic evidence and reformation mandates require courts to expend resources unnecessarily on proceedings that even the donor sought to avoid for her own estate. Indeed, the government is adversely affected by many of the same concerns that would motivate a donor to bar extrinsic evidence and reformation: the increased cost, complexity, and duration of court proceedings necessary to administer the instrument or litigate a dispute.

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[222] *See id.* at 2249-50 (concluding that trust modification rules should operate by default rather than mandate because "[o]therwise, such a doctrine will clash for no apparent reason with its analogue in contract law").

[223] *Id.* at 2245.

[224] For example, under the harsh common law doctrine of abatement, the death of a personal injury plaintiff before entry of a final judgment extinguishes the claim, thereby precluding the estate from continuing the action in court. For criticism of this doctrine and the subsequent unprincipled patchwork of abatement reforms, see David Horton, *Indescendibility*, 102 CALIF. L. REV. 543, 557-58 (2014).

[225] *See* Frances Kahn Zemans, *Court Funding* 4 (Prepared for ABA Standing Comm. on Judicial Independence, 2003), https://www.americanbar.org/content/dam/aba/administrative/judicial_independence/courtfunding.authcheckdam.pdf [https://perma.cc/J2MZ-E3L6] ("As part of the court unification movement, reformers pushed for state funding as a way to equalize justice within the states and to improve efficiency by simplifying and centralizing budgeting.").

It is generally true that the application of foreign procedures and litigation rules impose burdens on courts.[226] Application of foreign procedures requires a court to devote time and clerk power to learning an unfamiliar body of law, so it is generally more efficient to require the litigants to accept the local rules of the presiding court.[227] But enforcement of a donor's preference to bar extrinsic evidence and reformation imposes only the most nominal burden of making a simple (in most cases) binary determination—whether the donor intended to permit or prohibit extrinsic evidence and reformation.[228] A court, upon ascertaining the donor's intent to bar extrinsic evidence and reformation, could then spare the time and expense of evidentiary hearings and interpretative analysis typically required of such matters, a savings that would more than offset the minimal burdens associated with ascertaining the donor's intent at the outset.[229]

B. *No-Contest and Arbitration Clauses*

A "no-contest" clause is an estate planning technique of ancient vintage that discourages probate litigation through incentives for beneficiaries to accept a will's validity without challenge.[230] The clause creates incentives for beneficiaries to avoid litigation by imposing the penalty of inheritance forfeiture for bringing a will contest.[231] A no-contest clause forces an aggrieved

[226] *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (AM. LAW INST. 1971) ("A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case."). The Restatement comment explains:

> Enormous burdens are avoided when a court applies its own rules, rather than the rules of another state, to issues relating to judicial administration, such as the proper form of action, service of process, pleading, rules of discovery, mode of trial and execution and costs. Furthermore, the burdens the court spares itself would have been wasted effort in most instances, because usually the decision in the case would not be altered by applying the other state's rules of judicial administration. Even if the outcome would be altered, however, the forum will usually apply its own rule if the issue primarily concerns judicial administration.

Id. at cmt. a.

[227] *See id.* cmt. a.

[228] *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 213 cmt. b (AM. LAW INST. 1981) ("To apply this rule, the court must make preliminary determinations that there is an integrated agreement and that it is inconsistent with the term in question.").

[229] *Cf.* Gazur, *supra* note 193, at 420 ("[O]pening wills to the possible admission of more extrinsic evidence can only add [cost] to estate litigation.").

[230] *See* Gerry W. Beyer, Rob G. Dickinson & Kenneth L. Wake, *The Fine Art of Intimidating Disgruntled Beneficiaries with In Terrorem Clauses*, 51 SMU L. REV. 225, 230-31 (1998).

[231] *See* Hirsch, *supra* note 3, at 2207. A properly drafted no contest clause must therefore provide at least some device, perhaps an inheritance less than the beneficiary would receive

beneficiary to evaluate the merits of the possible contest: a successful contest sets aside the will, including the no-contest clause, whereas an unsuccessful contest results in the contestant's forfeiture of all inheritance under the will.[232] This technique is unique to inheritance law because it serves a dispute resolution function necessitated by the testator's inevitably permanent absence from the contest proceeding—were the testator alive, she would terminate the dispute by simply disinheriting the offending contestant.[233]

From the perspective of testamentary freedom, no-contest clauses allow testators to plan ahead for and reduce the possibility of estate litigation.[234] Although no-contest clauses are not typically included unless the testator anticipates a possible will contest, testators generally prefer to avoid estate litigation because it is often emotionally wrenching for the grieving family, it typically plays out in the public forum of a court proceeding, and it can impose enormous litigation costs that drain the estate of assets that would have otherwise been distributed to beneficiaries.[235]

The downside of no-contest clauses is that they can unwind the protective doctrines designed to prevent the probating of wills procured by undue influence, fraud, or duress, as well as wills made by individuals suffering from severely diminished cognitive function.[236] A will contest challenging validity is generally necessary to activate those protective doctrines.[237] Common law equitable principles were also generally hostile to rules or conditions that resulted in forfeiture.[238] For these reasons, at least two jurisdictions provide by statute that such clauses are void per se,[239] and nearly half the states (and the

by intestacy, to all likely contestants, otherwise a contestant would forfeit nothing by contesting. *See id.* at 2011.

[232] *See, e.g.*, Rudd v. Searles, 160 N.E. 882, 886 (Mass. 1928) ("The beneficiary has the option, either to receive the gift under the will, or undertake a contest of the will.").

[233] *See* Hirsch, *supra* note 3, at 2208 ("A no-contest clause becomes necessary only because of, and to compensate for, the testator's ineluctable disappearance, hence his or her inability to testify at a proceeding challenging the will's effectiveness, or to deal with contestants otherwise.").

[234] *See id.* at 2208 ("Defenders of the modern rule nullifying no-contest clauses where probable cause exists for the contest focus on the possibility that a contest is meritorious—that the will is the product of incapacity.").

[235] *See* Beyer, *supra* note 230, at 261-69 (summarizing benefits of no contest clauses).

[236] *Cf.* Hirsch, *supra* note 3, at 2208-09 ("Indeed, undue influencers or perpetrators of fraud might themselves be responsible for including [the clause] as a result of their wrongdoing.").

[237] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 8.5 cmt. b (AM. LAW INST. 2003).

[238] *See* Deborah S. Gordon, *Forfeiting Trust*, 57 WM. & MARY L. REV. 455, 467 (2015).

[239] FLA. STAT. § 732.517 (2018); IND. CODE § 29-1-6-2 (2018); *see* Hirsch, *supra* note 3, at 2207.

UPC) enforce no-contest clauses only for frivolous contests, such as those brought without probable cause of invalidity.[240]

From the perspective of the governmental interest, by contrast, the enforcement of no-contest clauses reduces burdens on courts that must otherwise expend judicial resources on adjudicating estate litigation.[241] The governmental interest in maximizing efficiency in the administration of justice therefore conflicts with rules that set aside no-contest clauses to reinforce the potency of wills law protective doctrines.[242] And, as Hirsch observes, the UPC's probable cause standard—laudably intended by the Code's drafters to balance the testator's desire to discourage estate litigation against the State's paternalistic concern that such clauses deactivate the protective doctrines—in fact exacerbates the costs imposed on courts.[243] When a contestant brings an unsuccessful challenge in the face of a no-contest clause, the court must then make a second determination of whether the contest was founded upon probable cause, a determination that extends the length and complexity of the proceeding.[244]

A testamentary or trust arbitration clause, like a no-contest clause, is an estate planning technique through which a testator or trust settlor seeks to regulate the procedures of dispute resolution concerning the validity or terms of a will or trust.[245] Donors sometimes favor arbitration for resolving such disputes as a less expensive and more private alternative to courtroom litigation.[246]

A mandatory arbitration clause purports to require that disputes be adjudicated by a private arbitrator rather than the court system.[247] Courts

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[240] *See* UNIF. PROBATE CODE §§ 2-517, 3-905 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, amended 2010); T. JACK CHALLIS ET AL., STATE LAW: NO-CONTEST CLAUSES 2 (Am. Coll. of Tr. and Estate Council 2012) ("The largest group of states (22) adopt the Uniform Probate Code rule and state that no-contest clauses are enforceable, unless the contest is based on probable cause.").

[241] Hirsch, *supra* note 3, at 2208 ("The clause discourages costly litigation that the state traditionally subsidizes . . . .").

[242] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 8.5 cmt. b (AM. LAW INST. 2003) (stating while validity of no-contest clauses is justified by prevention of costly litigation, court must be able to determine validity of purported transfer).

[243] *See* Hirsch, *supra* note 3, at 2209 ("A probable cause rule for no-contest clauses ostensibly reconciles these policies by fending off unmeritorious litigation, while at the same time blocking efforts to avert bona fide challenges.").

[244] *Id.* ("[I]n other words, the probable cause rule can give rise to an extra layer of litigation, and thus to additional costs.").

[245] *See generally* E. Gary Spitko, *The Will as an Implied Unilateral Arbitration Contract*, 68 FLA. L. REV. 49, 57 (2016) (noting "testator's direction that any challenge to his will must be arbitrated").

[246] *See id.* at 50-51 (summarizing benefits of testamentary arbitration).

[247] *See* E. Gary Spitko, *Gone but Not Conforming: Protecting The Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L.

typically enforce such clauses on grounds that parties *agree* to waive litigation rights and submit disputes for private resolution in arbitration.[248] In this vein, under the Federal Arbitration Act, a written agreement to arbitrate is generally binding upon contractual parties,[249] but wills and trusts are not contracts and, thus, they raise questions about the beneficiaries' assent and the resulting enforceability of compulsory arbitration.[250]

In disputes challenging the validity of a will or trust (including the validity of the arbitration provision), courts have split on whether to enforce compulsory arbitration.[251] As Professor Grayson M.P. McCouch explains, courts have set aside testamentary arbitration provisions "on the public policy ground that a transferor cannot unilaterally deprive an interested party of access to the courts."[252] The Pennsylvania Superior Court, for instance, cautioned against the slippery slope of enforcing testamentary arbitration against a contestant's claim of incapacity.[253] But as Professor David Horton observes, testamentary and trust

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REV. 275, 294 (1999) ("Arbitration provides an alternate, arguably more viable, means for the testator to have a voice at the table when the validity of her estate plan is adjudicated.").

[248] *See* Grayson M.P. McCouch, *Another Perspective on Testamentary Arbitration*, 68 FLA. L. REV. 68, 73 (2016) ("Arbitration is essentially a consensual process. . . . [A] party who has not agreed to submit a dispute to arbitration cannot be compelled to do so."). Objections to the enforcement of an arbitration provision are often based on claims that the agreement to arbitrate was "tainted by mistake, fraud, or duress." David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 379 (2018).

[249] *See* 9 U.S.C § 2 (2012).

[250] *Compare* David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1058-60 (2012) (stating that "default rule approach to contractual separability—the idea that the mere existence of an arbitration clause in a document triggers a finding that the parties have agreed to arbitrate disputes about that document—does not translate neatly into the realm of decedents' estates[]" because wills and trusts are not contracts and beneficiaries often do not assent to arbitration), *with* Spitko, *supra* note 245, at 55 ("A will sets out the terms of a contract between the testator and the state: a will is, in essence, part of an implied unilateral contract pursuant to which the state offers to give effect to the testator's donative wishes at his death, and the testator accepts the offer and gives consideration for the contract by creating wealth, preserving and investing his property, and refraining from wasting his estate.").

[251] *Compare In re* Revocation of Revocable Tr. of Fellman, 604 A.2d 263, 267 (Pa. Super. Ct. 1992) (holding that determination of testamentary capacity could not be resolved by arbitration), *with In re* Nestorovski Estate, 769 N.W.2d 720, 732 (Mich. Ct. App. 2009) (enforcing arbitration finding that set aside will procured by undue influence from testator lacking capacity).

[252] McCouch, *supra* note 248, at 72. The question of whether the validity of an arbitration clause should be decided by a court or arbiter has proven to be a particularly vexing question. *See* Horton, *supra* note 248, at 363 ("But now, through the use of 'delegation clauses,' businesses are giving arbitrators the exclusive power to decide these issues.").

[253] The Pennsylvania Superior Court states:

> If we were to hold that issues of competency could appropriately be submitted to

arbitration provisions "are not categorically incompatible with the" Federal Arbitration Act ("FAA"), which preempts state laws purporting to invalidate arbitration agreements on grounds other than those arising under contract law.[254]

State-level public policy disfavoring testamentary and trust arbitration is not only out of step with the broader privatization of property succession through the authorization of nonprobate transfers,[255] but also contrary to the governmental stake in private wealth transfer. Just as no-contest clauses help conserve judicial resources by discouraging interested parties from initiating litigation to resolve estate disputes, mandatory arbitration clauses remove such disputes from court dockets and permit resolution in a private alternative dispute forum.[256]

CONCLUSION

Wealth transfer law's primary concern for donative autonomy and the freedom of disposition has overshadowed the need to consider important governmental interests in regulating donative transfers. By overlooking the need for a unifying theory of governmental interests, wealth transfer law exhibits doctrinal incoherence that under-regulates donative transfers by failing to impose mandates that protect the State and that over-regulates by imposing mandates that both run contrary to governmental interests and override donative preferences. This Article articulates a unified theory of governmental stake in the regulation of private wealth transfer and identifies three core interests that warrant heightened protection for the State even at the cost of overriding donative preferences: (1) enforcement of criminal and civil laws; (2) conservation and allocation of public financial resources; and (3) efficiency in the administration of justice. The State's interests, in turn, reveal significant implications for reform of current doctrines governing trust privacy, disclaimers

> arbitration, we would be faced with several unwanted ramifications. In the instant case, for example, would a determination of the settlors' incompetency be entered as a final judgment in the records of the Court of Common Pleas? May the arbitrators appoint a guardian of the estate and of the person? If not, may a court rest the appointment of a guardian on the arbitrators' finding of incompetency or must a new court hearing be held? If so, may the guardian commit the incompetent to a hospital or select the type of medical treatment and lifestyle the incompetent will be permitted? How will the guardian's decisions be reviewed?

In re Fellman, 604 A.2d at 267.

[254] Horton, *supra* note 250, at 1070-71 (noting that courts have not limited FAA exclusively to "contracts" and that testamentary instruments constitute transactions involving interstate commerce).

[255] *Cf.* McCouch, *supra* note 248, at 68 ("The twin phenomena of probate avoidance and mandatory arbitration clauses stem from a common desire on the part of transferors to control the process as well as the substantive terms governing the disposition of their accumulated wealth.").

[256] *See* Horton, *supra* note 250, at 1050 (noting Supreme Court's justification of arbitration decisions "on the ground that arbitration leads to 'streamlined proceedings and expeditious results'").

subject to government liens, reformation and the admissibility of extrinsic evidence, and no-contest and arbitration clauses.