NOTE

AND THE HEIRS OF HIS TRUST CORPUS: HOW THE FEE TAIL AND HISTORICAL LIMITATIONS ON PERPETUITIES CAN INFORM THE LAW OF PERPETUAL TRUSTS

Liam Edward Cronan[*]

ABSTRACT

The fee tail, common recoveries to convert a fee tail to fee simple, and strict settlements to preserve family control of land are today regarded, if at all, as relics of legal history. Yet, these long obsolete facets of the common law demonstrate earlier solutions to a problem that is again posed today. Caused in part by the abolition of the Rule Against Perpetuities in many states, perpetual (or dynasty) trusts, trusts with no fixed time limit that can avoid tax liability in perpetuity, promote inherited wealth within lines of descent and are a rapidly growing yet vastly underreported problem for trust and tax law that affect broader societal concerns over increasing wealth inequality. The fee tail was the earliest example of a perpetuity, and as such, it provoked a series of judicial and legislative reactions against what were viewed as the pernicious effects of perpetuities. The efforts of judges and legislatures are again needed to prevent these arrangements from lasting indefinitely. The solution to this problem, as this Note explains, is in broad strokes the same as that in earlier legal history.

Inspired by the release of the Pandora Papers in October 2021, this Note aims to offer a comparison between historic limitations on perpetual intergenerational control over familial wealth and modern applications of

[*] J.D. candidate, Boston University School of Law, 2023; M.A. in History candidate, *Phi Alpha Theta*, Boston University, 2023; B.A. in History & Economics, *summa cum laude*, *Phi Beta Kappa*, Tufts University, 2020. I first want to offer my sincerest thanks to Professor David J. Seipp for encouraging my interest in legal history and trust law, for his boundless knowledge of English legal history and trust and estate law, and for his extensive comments on prior drafts of this Note. I am grateful as well to Professor Robert H. Sitkoff for discussing additional suggestions to earlier versions of this Note. I also wish to express my gratitude to Lisa Mary Richmond, Maggie Houtz, Tobi Henzer, Doug Mo, Esther Miller, Caroline Grady, Minas Rasoulis, and all of my outstanding fellow editors on the *Boston University Law Review*. To all those not mentioned who have also influenced the writing of this Note and my study of law and history, I too extend my sincerest thanks. And finally to my fiancée, Phoebe A. Sargeant, for whom my love and affection are as enduring as a well-drafted South Dakota perpetual trust.

judicial limitations to perpetual trusts. This Note looks to combat the problem of perpetual trusts by connecting the long history of judicial limitations on perpetuities to two modern solutions: (1) a proposed model statute and (2) renewed methods of interpreting existing trust statutes through the examples of South Dakota, Nevada, Delaware, and Tennessee, states that commonly harbor perpetual trust. This historical lens informs an understanding both of perpetual trust's present issues and the potential solutions to the problems that perpetual trusts propose through the modification of state statutes or renovated interpretations of existing trust law. Once again, it is for courts or legislatures to curtail the effects of unreasonably long trust duration through better doctrines on the modification and termination of trusts.

CONTENTS

INTRODUCTION 662
I. THE HISTORY OF FEES TAIL AND PERPETUITIES 666
A. *Fee Tail Estates* 666
1. The Origins of the Fee Tail 667
2. Common Recovery and Strict Settlement of the Fee Tail 668
3. The End of the Fee Tail 671
B. *From Fees Tail to Uses and the Rule Against Perpetuities* 672
1. Early Restrictions on Perpetuities 673
2. Later Restrictions on Perpetuities 675
3. The Origins of the Rule Against Perpetuities 676
C. *From the Rule Against Perpetuities to Modern Trust Law* 677
II. PERPETUAL TRUSTS AND THE PROBLEM OF PERPETUAL CONTROL 680
A. *Modern Perpetuities and Perpetual Trusts* 680
1. The Repeal of the Rule Against Perpetuities 681
2. The Rise of the Generation-Skipping Transfer Tax 684
B. *The Benefits and Detriments of Perpetual Trusts* 686
1. Trust Benefits 687
2. Policy Detriments 688
III. PERPETUAL TRUSTS AND A HISTORICAL LENS TO SOLUTIONS 691
A. *Dismissing Alternatives: Federal Solutions, Constitutional and Statutory* 692
1. Federal Constitutional Solution 692
2. Federal Statutory Solution 693
B. *State Statutory Change: Returning to a Reasonable Rule Against Perpetuities* 695
1. Perpetual Trusts as Perpetuities 696
2. Reasonable Modification of Perpetual Trusts 696
C. *State Judicial Interpretation: A Return to Equitable Standards* 699
1. Perpetual Trusts as a Fee Tail 700
2. Modification and Termination of Perpetual Trusts 702
3. Decanting Perpetual Trusts 705
4. Powers of Appointment for Perpetual Trusts 709
CONCLUSION 711

INTRODUCTION

The Panama Papers in 2016 and the Paradise Papers in 2017 revealed what many have come to expect about offshore accounts: tax havens and trust funds in far-off tropical islands, where familial wealth can grow without interference from U.S. taxation and regulation.[1] The Pandora Papers, a trove of over 11.9 million confidential documents released in October 2021, reveal a location of vast numbers of these tax-avoiding trust funds somewhere far more unexpected: Sioux Falls, South Dakota.[2] South Dakota, however, is only one of a number of states that harbor such trusts. Trust-friendly states such as Nevada, Delaware, and Tennessee harbor billions of dollars in perpetual trust funds for clients across the globe.[3] Perpetual trusts, sometimes referred to as dynasty trusts, permit a

[1] *See* Suzanne Garment, *Pandora Papers Put South Dakota in Unsavory Company. Here's Why.*, NBC NEWS: THINK (Oct. 5, 2021, 4:34 AM), https://www.nbcnews.com/think/opinion/pandora-papers-put-south-dakota-unsavory-company-here-s-why-ncna1280761 [https://perma.cc/SE4N-32D6]; Daniel Hemel, *South Dakota's Tax Avoidance Schemes Represent Federalism at Its Worst*, WASH. POST (Oct. 7, 2021, 11:54 AM), https://www.washingtonpost.com/outlook/2021/10/07/tax-shelters-states-pandora/; Juliana Kaplan, *The Oscar Mayer Heir Who Gave Away His Fortune To Fight Inequality Explains Why South Dakota Became America's Secret $360 Billion Tax Haven and How It Exposes the US as the World's 'Weak Link,'* INSIDER (Oct. 4, 2021, 1:14 PM), https://www.businessinsider.com/why-rich-hide-money-south-dakota-tax-haven-pandora-papers-2021-10 [https://perma.cc/8B4W-A65T]; Laura Saunders, *Dynasty Trusts Under Attack*, WALL ST. J. (Mar. 5, 2011, 12:01 AM), https://www.wsj.com/articles/SB10001424052748703752404576179031767463642; Ben Steverman, Anders Melin & Devon Pendleton, *The Hidden Ways the Ultrarich Pass Wealth to Their Heirs Tax-Free*, BLOOMBERG (Oct. 21, 2021, 12:00 AM), https://www.bloomberg.com/features/how-billionaires-pass-wealth-to-heirs-tax-free-2021/.

[2] Howard Gleckman, *South Dakota Turned Itself into a Tax Haven. But Why?*, FORBES (Oct. 14, 2021, 3:03 PM), https://www.forbes.com/sites/howardgleckman/2021/10/14/south-dakota-turned-itself-into-a-tax-haven-but-why/ ("In recent decades, South Dakota has become *one of the world's great tax havens*. By the end of last year, more than $367 billion in trust assets were managed in the state through at least 62 publicly-chartered trusts." (emphasis added)); Hemel, *supra* note 1.

[3] Gleckman, *supra* note 2 (describing how South Dakota's lack of income tax coupled with temporally unlimited generational trusts allows nonresidents to keep assets in tax-free jurisdiction for perpetuity); Zachary Mider, *South Dakota, Little Tax Haven on the Prairie*, BLOOMBERG (Jan. 9, 2014, 3:56 PM), https://www.bloomberg.com/news/articles/2014-01-09/south-dakota-dynasty-trusts-tax-haven-for-rich-families ("South Dakota was a pioneer in 'dynasty trusts,' which allow families to escape estate taxes forever."); Stephen M. Russell & Robert D. Malin, *Commentary: Four Ways Tennessee's New Trust Regulations Benefit Individuals and Families*, TENN. LOOKOUT (July 30, 2021, 5:00 AM), https://tennesseelookout.com/2021/07/30/commentary-four-ways-tennessees-new-trust-regulations-benefit-individuals-and-families/ [https://perma.cc/PK9X-PY99] (highlighting how Tennessee's repeal on passive investment income makes state more attractive destination for trust registration); Luke Savage, *State Governments Are Colluding with Billionaires To Shield Their Wealth from Taxation*, JACOBIN (Sept. 29, 2022), https://jacobin.com/2022/09/state-governments-tax-haven-billionaire-trust-shield-wealth-taxation (characterizing Delaware, South Dakota, and Nevada as among main states lowering standards to attract trust business).

trust's settlor to transfer assets up to the amount exempt from federal estate taxation, currently just under $26 million for a married couple,[4] in trust for the benefit of potentially infinite generations of beneficiaries, free from the forty percent federal estate tax that would apply at each generational interval.[5] While the revelations of the Pandora Papers are thus as seemingly surprising as they are novel, such attempts to bind familial wealth in perpetuity and avoid taxation are far from new within the annals of property, trust, and estate law.

Prominent scholars of trusts and estates have alluded that perpetual trusts are little more than modern forms of fees tail.[6] A gift in tail, better known as a fee tail or entailed estate, first became possible in England in 1285 with the statute *De Donis Conditionalibus*, a part of the Statute of Westminster II.[7] This form of estate allowed possession of real property to pass to the eldest child of each generation in perpetuity.[8] For centuries, the fee tail was a fashionable form of estate to hold land within one family's descendants perpetually, but English judges permitted a collusive lawsuit known as a "common recovery," a way for a present possessor of a fee tail to transform their estate into a fee simple by losing a collusive lawsuit.[9] Grantors, in response, used strict settlement as arrangement to ensure that no adult had a present possessory estate in fee simple, so as to prevent the conversion of the fee tail into a fee simple. They likewise employed contingent remainders, shifting executory interests, and uses to transfer property in perpetuity.[10] A compromise was reached, known as the strict settlement, that used all of these tools to push forward a family's fee tail control

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[4] As of 2023, the current exemption amount is $12,920,000 per person, or up to $25,840,000 per married couple. Otherwise put, an estate in which the value of the trust assets is less than $25,840,000 is exempt from federal estate taxes. *See Estate Tax*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/estate-tax [https://perma.cc/E5MA-U85V] (last updated Oct. 26, 2022). The value of assets, however, can grow far larger than the federal limit by way of insurance. *See* Ray D. Madoff, Opinion, *America Builds an Aristocracy*, N.Y. TIMES (July 11, 2010), https://www.nytimes.com/2010/07/12/opinion/12madoff.html ("Dynasty trusts can grow much larger than the . . . exemption amount would suggest. A couple can, for example, put [assets] into a life insurance policy owned by the trust. They apply their exemption at the start, and the trust is forever free from taxes even when, after the death of the second spouse, the life insurance policy pays off . . . .").

[5] Hemel, *supra* note 1.

[6] *See, e.g.*, Steven J. Horowitz & Robert H. Sitkoff, *Unconstitutional Perpetual Trusts*, 67 VAND. L. REV. 1769, 1786-87 (2014) (concluding that "[t]he contemporary perpetual trust is, in other words, a modern fee tail").

[7] De Donis Conditionalibus 1285, 13 Edw. 1 c. 1 (Eng.); *see* THOMAS LITTLETON, LITTLETON'S TENURES § 13, at 7 (Eugene Wambaugh ed., J. Byrne & Co. 1903) (1482) ("Tenant in fee tail is by force of the statute of Westminster II . . . .").

[8] De Donis Conditionalibus 1285, 13 Edw. 1 c. 1 ("Where any giveth his Land to any Man and his Wife, and to the Heirs begotten of the Bodies of the same Man and his Wife . . . .").

[9] *See infra* Part I.

[10] As will be elaborated on in Part I, contingent remainders are future interests in land held by a third party that vest on some condition, executory interests are future interests held in a third party that vest on some condition and prematurely end the present estate, and uses are the early modern precursor to trust funds.

over inheritance one successive generation at a time, alongside limitations such as the Rule Against Perpetuities ("RAP").[11] The RAP, as it has been applied since its origins in the late seventeenth century, has maintained the policy goals of keeping property alienable[12] and preventing extensive temporal control over property. For centuries, in sum, the trend in trust and estate law saw increasingly clever conveyances of property to effect perpetual control and the counteracting use of novel legal doctrines to limit the ability of donors to provide for perpetual grants.[13] By result, American law long "handled the rare pleasure of a giant inheritance with suspicion" and curtailed such inheritances.[14]

By the end of the twentieth century, thanks in part to interstate competition for trust funds, nearly two-thirds of American jurisdictions had modified, limited, or completely repealed their RAPs, paving the way for perpetual trusts. More generally, the law "has taken a more accommodating approach to dynastic fortunes—slashing rates, widening exemptions, and permitting a vast range of esoteric loopholes for wealthy taxpayers."[15] These new planning devices, by consequence, have radically altered the practice of trust and estate law. Practicing trusts and estate attorneys now encourage perpetual trusts to allow clients to shelter just under twenty-six million dollars of their assets from taxes for anywhere from ninety years to potentially infinite generations of descendants.[16] With the passage of the Generation-Skipping Transfer Tax exemption in 1986 and the subsequent increase in the amount exempt from estate taxation from a modest $325,000 in 1986[17] to over $12 million in 2022 (and double that amount for a married couple), millions of dollars passed over generations exempt from estate taxes for as long as state laws permitted the duration of private trusts, which led to repeal of the RAP in many states and the rise of perpetual trusts.[18] Moving forward, their perpetual nature and indefinite

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[11] *See infra* Part I.

[12] *See Alienable*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Capable of being transferred to the ownership of another . . . .").

[13] *See Donor*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Someone who gives something without receiving consideration for the transfer.").

[14] Evan Osnos, *The Getty Family's Trust Issues*, NEW YORKER (Jan. 16, 2023), https://www.newyorker.com/magazine/2023/01/23/the-getty-familys-trust-issues.

[15] *Id.*

[16] *See infra* Part II.

[17] Taking inflation into account, the buying power of $325,000 in January 1986 is equivalent to that of $880,100.59 in December 2022. Thus, the increase in the tax-exempt amount from 1986 to 2022 was between thirteenfold and fourteenfold. *See CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm (last visited Feb. 10, 2023).

[18] *See* JOINT COMM. ON TAX'N, HISTORY, PRESENT LAW, AND ANALYSIS OF THE FEDERAL WEALTH TRANSFER TAX SYSTEM 12 (2015), https://www.jct.gov/CMSPages/GetFile.aspx?guid=ab7cca94-69c3-4023-9f78-d4bc31b2c5f9 [https://perma.cc/Q92U-NGP5] (tabularizing estate and gift tax exception amounts between 1977 and 2015); *see also* Tax Reform Act of 1986, Pub. L. No. 99-514, §§ 1431-33, 100 Stat. 2085, 2717-32. The Generation-Skipping Transfer Tax functions, in effect, by allowing a decedent's owed federal

and uncertain lifespan will inevitably require modification as these trusts age, warranting new approaches to modification from the outset. It is here that the fee tail and perpetual trust collide.

In addressing this issue, this Note seeks to offer a comparative historical analysis to provide a novel solution. The fee tail, common recoveries to convert fees tail to fee simple, and strict settlements to preserve family control of land are today regarded as relics of early legal history that are an unnecessary footnote to a legal education. Yet, these now obsolete relics of the common law show earlier solutions to a problem posed again in the present day. Trust arrangements designed to perpetuate inherited wealth within their dynastic lines of descent, caused in part by the abolition of the RAP in many states, are again posing problems for the larger society. The efforts of judges and legislatures are again needed to prevent these arrangements from lasting indefinitely into the future. The fee tail was the original example of a perpetuity, and as such, it provoked a series of judicial and legislative reactions against what was viewed as pernicious effects of perpetuities. Thus, the current problem, comparable to the fee tail at America's founding, is the perpetual trust, now being created in a majority of U.S. states. The solution to this problem, this Note explains, is in broad strokes the same as that in our earlier legal history. Therefore, a proper understanding of perpetual trusts today is emphatically incomplete without a true understanding of what a perpetuity meant at common law and how it evolved. This historical lens will then inform an understanding both of the perpetual trust's present issues and the potential solutions to the problems that perpetual trusts pose through the modification of state statutes or renovated interpretations of existing trust law. It is for courts or legislatures to curtail the worst effects of unreasonably long trust duration through better doctrines on the modification and termination of trusts.

In so doing, the organization of this Note proceeds as follows. Part I explores the history of the fee tail from its outset in 1285, the end of fee tail's power through the common recovery and strict settlements, the use of other perpetual grants, and the origins of the RAP. The theme of this Part will be a struggle between attempts to create perpetual transfers of property and judicial decisions preventing them. Part II then surveys the repeal of the RAP alongside the beginning of the Generation-Skipping Transfer Tax and the expansion of its exemption amount. The focus of this Part will be on how the repeal of the RAP and the outset of the Generation-Skipping Tax allowed for the creation of perpetual trusts, with all the administrative problems these encompass. Part III, after dismissing the applicability of a constitutional or federal statutory solution, proposes a state law solution through a model statute that would bring about a revived form of early rules against perpetuities and a three-part common law solution that would craft a modern form of the common recovery by reinterpreting existing state statutes. The emphasis of this Part will be a balance

inheritance tax to be paid two or more generations removed from the transferor. *See* 26 U.S.C. § 2611 (defining generation-skipping transfer).

between permitting the continuation of perpetual trusts while at the same time lessening their potentially infinite control.

I. THE HISTORY OF FEES TAIL AND PERPETUITIES

This Note's background, more sweeping than most others, covers 660 years of law, beginning with the origins of fees tail in 1285 and the idea of a perpetuity as it has evolved through the mid-twentieth century. Today, a pure fee tail is unrecognized in American law, with most states having abolished such estates in the late eighteenth century.[19] Thus, the fee tail is dead letter. Why, then, does this archaic vestige of medieval law deserve our attention? In short, if one is to understand the problem of perpetual trusts today or attempt to propose solutions to that problem, then one must situate their knowledge of perpetual trusts within the background of a centuries-long struggle between dynastic control of inherited wealth and judicial efforts to limit such attempts at perpetual grants. Part I focuses, therefore, on the history of perpetuities. This history, by extension, will inform an understanding both of perpetual trusts' present issues and the potential solutions to the problems that the indefinite duration of perpetual trusts pose.

A. *Fee Tail Estates*

Fees tail are frequently given little more than a passing reference by even the most historically minded scholars of Property and Trusts & Estates.[20] By contrast, often disproportionate attention is given to the RAP—the bane of generations of law students—despite its being all but eliminated or curtailed for new transfers of wealth in the vast majority of U.S. jurisdictions today.[21] The "classic formulation of the [r]ule" derives from the work of John Chipman Gray,[22] who (infamously) restated the rule that "[n]o interest is good unless it

[19] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 24.4 (AM. L. INST. 2011); JOHN HABAKKUK, MARRIAGE, DEBT, AND THE ESTATES SYSTEM: ENGLISH LANDOWNERSHIP, 1650-1950, at 1-5, 17, 36, 46-47 (1994). *See generally* EILEEN SPRING, LAW, LAND, AND FAMILY: ARISTOCRATIC INHERITANCE IN ENGLAND, 1300 TO 1800 (1993); LLOYD BONFIELD, MARRIAGE SETTLEMENTS, 1601-1740: THE ADOPTION OF THE STRICT SETTLEMENT (1983). In England, the fee tail was likewise abolished in 1926 by the Administration of Estates Act. *See* Richard B. Morris, *Primogeniture and Entailed Estates in America*, 27 COLUM. L. REV. 24, 24-25 (1927).

[20] *See, e.g.*, THOMAS MERRILL & HENRY SMITH, PROPERTY 505-07 (3d ed. 2017) (describing decline of fee tail within history of law on estates in land); ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 888-94 (10th ed. 2017) (tracing relationship between fees tail and RAP).

[21] Currently, twelve states have no RAP in place, while only five states maintain a traditional rule and all others have modified it. *See infra* Part II. Even so, because older wills and trusts are still subject to the RAP, and indeed wills and trusts may be litigated over decades after their creation, the common law rule is not falling out of fashion as quickly as some may imagine.

[22] *See* Stephen A. Siegel, *John Chipman Gray, Legal Formalism, and the Transformation of Perpetuities Law*, 36 U. MIA. L. REV. 439, 440 n.3 (1982). Gray was a scholar of property

must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[23] Where still in force, this rule affects the duration of both grants in land and trusts, limiting the ability to create a perpetuity. Yet few of the rule's bewildered students may consider why it provides such a harsh, unwavering limitation. The answer lies in the fee tail.

1. The Origins of the Fee Tail

The first perpetuity came in 1285 during the reign of Edward I, when the English Parliament enacted the statute *De Donis Conditionalibus* ("on conditional gifts").[24] Medieval laws of inheritance at common law generally lacked any freedom of disposition for decedents,[25] but this statutory modification allowed a donor[26] to create an estate in land that would pass as a perpetual estate and that placed restrictions on donees' ability to alienate land for longer than the lifetime of any such donee or descendant.[27] Thus the fee tail was born.

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law at Harvard Law School and cofounder of Boston's oldest and largest law firm, Ropes & Gray LLP. *See generally* Ezra Ripley Thayer, Samuel Williston & Joseph H. Beale, *John Chipman Gray*, 28 HARV. L. REV. 539 (1915).

[23] JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201, at 191 (4th ed. 1942); *see also Rule Against Perpetuities*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[24] De Donis Conditionalibus 1285, 13 Edw. 1 c. 1 (Eng.) ("Concerning Lands that many times are given upon Condition, that is to wit, Where any giveth his Land to any Man and his Wife, and to the Heirs begotten of the Bodies of the same Man and his Wife, with such Condition expressed that if the same Man and his Wife die without Heirs of their Bodies between them begotten, the Land so given shall revert to the Giver or his Heir . . . ."); *see* LITTLETON, *supra* note 7, § 13, at 7 ("[F]or before the said statute [*De Donis Conditionalibus*], all inheritances were fee simple . . . .").

[25] *See* Meggie Orgain, *Death Comes to Us All, but Through Inheritance, the Rich Can Get Richer: Inheritance and the Federal Estate Tax*, 4 EST. PLAN. & CMTY. PROP. L.J. 173, 174-77, 179 (2011) ("Under the inheritance laws of medieval England, people lacked the freedom to decide what happened to their property after they died. Generally, two factors helped determine what happened to people's property at death: the situation they were born into and the place where they lived." (footnote omitted)); *see also* JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 293-94 (Oxford Univ. Press 5th ed. 2019). Some have connected the nature of this form of inheritance to historical social inequality. *See, e.g.*, Paul L. Menchik, *Primogeniture, Equal Sharing, and U.S. Distribution of Wealth*, 94 Q.J. ECON. 299, 299 (1980) ("Economies that feature primogeniture will have a greater degree of inequality than those featuring equal division.").

[26] *See Donee*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("One to whom a gift is made.").

[27] *See* John F. Hart, *"A Less Proportion of Idle Proprietors": Madison, Property Rights, and the Abolition of Fee Tail*, 58 WASH. & LEE L. REV. 167, 167 n.1 (2001) ("If the bloodline died out, with no remainder limited to follow, the land reverted to the grantor (or the grantor's heir) in fee simple."); Joshua C. Tate, *Perpetual Trusts and the Settlor's Intent*, 53 U. KAN. L. REV. 595, 599 n.12 (2005) ("[T]he English statute *De Donis* imposed restrictions on the ability of a donee in fee tail to alienate the land, and the royal justices gradually extended the restraint to subsequent generations, allowing for the creation of perpetual entails."); *see also* BAKER, *supra* note 25, at 293-94; Jeffrey Evans Stake, *Evolution of Rules in a Common Law System: Differential Litigation of the Fee Tail and Other Perpetuities*, 32 FLA. ST. U. L. REV.

In function, a fee tail created a potentially perpetual succession of possessory interests held by the donee and the donee's future descendants, with the remainder to be held in the grantor's heirs or a remainder to another branch of the grantor's family.[28] Stating that land was granted to a given person and "the heirs of his body"[29] was meant to ensure that the land would pass to the eldest surviving heir of the grantee, to vest[30] in possession when the descendant survived the grantee's death.[31] In its practical application, a given donee of a fee tail held a possessory interest for life, with his eldest child (or eldest son in the case of a fee tail male) to take on his death, and that eldest child's eldest child to take on his death, and so on until no heir remained, at which time the descendants of the original donor held a reversion or another donee's descendants held a remainder.[32] Thus a family could create a grant in land with no foreseeable end to the grant's control unless the entire lineage of a donee died out.

2. Common Recovery and Strict Settlement of the Fee Tail

By the fifteenth century, much of the land in England was held in tail.[33] The problem of the fee tail's ubiquity was its inalienability, differentiating it from

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401, 410-14 (2005). A tenant in fee tail could grant what possessory time on the land the tenant had, thus giving their possession to the grantee, but at the tenant's death, the tenant's next descendant would take back possession as if the tenant had died possessing it, and the grantee would be ejected. This process occurred through a Writ of Formedon in the Descender. *See Formedon in the Descender*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A writ of right for claiming entailed property held by another . . . brought by the issue in tail.").

[28] *See* LITTLETON, *supra* note 7, §§ 14-31, at 7-12 (describing various permutations inheritance rights for fees tail).

[29] The word "body," in the original Latin used in the grants, is "corpus," a term used today to describe trust assets. For a bilingual pun related to the dual meaning of this legal term, see the title of this Note.

[30] *See Vest*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("To confer ownership (of property) . . . .").

[31] *See* ZOUHEIR JAMOUSSI, PRIMOGENITURE AND ENTAIL IN ENGLAND 9-17 (Cambridge Scholars Publ'g 2011) (describing original rules of primogeniture and function of limiting terms on fees tail); J.B. Ruhl, *The Tale of the Fee Tail in* Downton Abbey, 68 VAND. L. REV. EN BANC 131, 131-33, 134 (2015) ("[C]onditional gifts of land unrelated to marriages emerged using a similar approach, such as '[O] to B *and the [male] heirs of his body*, but if B should die without [a male] heir of his body the land shall revert to [O].' The magic 'male heirs of his body' language acted in theory as a condition on the reversion to the grantor, but the real motive was to place restraints on the grantee." (alterations in original) (footnote omitted) (quoting JOSEPH BIANCALANA, THE FEE TAIL AND THE COMMON RECOVERY IN MEDIEVAL ENGLAND 1176-1502, at 6 (2001))); *Property—Deed to Grantee and Her Heirs by Her Present Husband Held To Create Vested Remainders Subject to Open in Grantee's Children*, 39 VA. L. REV. 385, 386 (1953) ("The classic method of creating an estate in fee tail is by the limitation, to A and the heirs of his body."); *see also* BAKER, *supra* note 25, at 293-94.

[32] Stake, *supra* note 27, at 410.

[33] George L. Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19, 28 (1977).

the fee simple, which was freely alienable by any given holder of the estate.[34] Once a donor created a fee tail, no holder of the entail could sell the full interest in the land free of the rights of the holder's descendants and those of holders of any reversions and remainders. The rank inefficiency of the policy behind the fee tail is a matter of common sense. Real property that cannot be sold could leave descendants with land they cannot afford to improve, cannot easily mortgage, and cannot exchange for other land.[35] In turn, those looking to purchase land were effectively prevented from doing so where most land was held in this inalienable form.[36] Additionally, those who were unwise enough to make a loan with the land held in tail as the security for the loan could be defrauded on the death of the borrower. Lastly, a system in which a generation is a mere tenant, subject to the next generation's rights, provides an obvious disincentive to increase the land's value beyond what is necessary to maintain an income.[37]

In responding to centuries of entailment and pushing back against the perpetual control of the fee tail, English courts used the common recovery, also known as "docking" or "barring" an entail, as a claim to transform a fee tail into a fee simple.[38] The common recovery was a collusive lawsuit in which a tenant in fee tail was sued by a plaintiff who claimed superior right to the land: the tenant would vouch a landless third party to defend his right to the land and proceed to lose the lawsuit; the plaintiff would win the fee simple and transfer it to the tenant. Descendants of the tenant in fee tail, and holders of remainders and reversions, were entitled to land of equivalent value from the third party, but the

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[34] *See* Stake, *supra* note 27, at 410 ("This feature of inalienability made the fee tail or 'entail' of 1450 dramatically different from the fee simple, which, by virtue of the Statute Quia Emptores, had been freely alienable since 1290." (footnote omitted)). The alienability of fees simple, by contrast, had been affirmed by the statute. *See* Quia Emptores 1290, 18 Edw. 1 c. 1 (Eng.).

[35] *See* Stake, *supra* note 27, at 411 ("[The fee tail] estate is not easy to defend on economic grounds.").

[36] *See id.* ("[T]he essence of the fee tail is its extremely restricted alienability, and that feature brings with it familiar costs.").

[37] Thomas Jefferson noted this inefficiency as early as 1776 while advocating against the continuation of the fee tail in Virginia. Jefferson argued that fees tail defrauded creditors, discouraged improvement on the land, and made children disobedient. *See* Thomas Jefferson, *Drafts of the Virginia Constitution*, *in* 1 THE PAPERS OF THOMAS JEFFERSON 329, 344, 352-53 (Julian P. Boyd ed., 1950) [hereinafter Jefferson, *Drafts*]; Thomas Jefferson, *To Edmund Pendleton*, *in* 1 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 491-92 [hereinafter Jefferson, *Pendleton*]; Thomas Jefferson, *Bill To Enable Tenants in Fee Tail To Convey Their Lands in Fee Simple*, *in* 1 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 560-61; Thomas Jefferson, *Autobiography: 1743-1790*, *in* 1 THE WORKS OF THOMAS JEFFERSON 3, 58-59 (Paul Leicester Ford ed., 1904) (1776) [hereinafter Jefferson, *Autobiography*].

[38] *See* Tate, *supra* note 27, at 599 n.12; Horowitz & Sitkoff, *supra* note 6, at 1775 ("Courts responded [to the prevalence of fees tail] by fashioning the 'common recovery,' a suit by which the possessory tenant could transform his fee tail interest into fee simple, a procedure known as 'barring' or 'docking' the entail." (footnote omitted)).

landless third party had nothing to give.[39] Although a legal fiction in the most literal sense, the common recovery avoided the inalienable nature of a pure entail.[40] By the seventeenth century, as affirmed in *Mildmay's Case*,[41] common recovery limited a dynastic-minded donor's control over inherited estates in favor of alienability by the land's present possessors.[42] Thus, common recovery was not a judicial scheme to prevent mortmain[43] control over an estate absolutely but rather to prevent a given grant from lasting in perpetuity.

The strict settlement was the first of many responses to the judicial creation of the common recovery. Strict settlements, in essence, reinvented the original fee tail in a way that circumvented the common recovery by ensuring that no adult had a present possessory estate in fee tail, meaning no tenant in fee tail could be sued in a common recovery.[44] More specifically, it provided that at marriage, a groom, already holding a future interest in fee tail, would exchange his interest for a present possessory interest in a life estate only, with a remainder held by trustees for a term of years followed by successive remainders in fee tail in his unborn sons and daughters.[45] This required the land to be reorganized and resettled at each generation, avoiding the possibility of a common recovery (because at no time was there an adult present possessor of the fee tail who could arrange to be sued by this collusive lawsuit)[46] while also providing that the land

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[39] *See* Horowitz & Sitkoff, *supra* note 6, at 1775; *see also* Hart, *supra* note 27, at 172 & nn.31-33 (describing features and effect of the common recovery).

[40] The first reported case to note the common recovery was *Taltarum's Case*. *See* Taltarum's Case, YB 12 Edw. 4, fol. 19a-21b, Mich., pl. 25 (1472) (Eng.); Stake, *supra* note 27, at 416 ("Some of these schemes worked and others failed, but in 1472 the judges in *Taltarum's Case* made it clear that one elaborate scheme, the 'collusive common recovery,' would bar the entail and eliminate the interest in the issue."); *see also* BIANCALANA, *supra* note 31, at 121, 250-51; Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law*, 43 CLEV. ST. L. REV. 221, 265 (1995); F.W. Maitland, Note, *Taltarum's* Case, 9 LAW Q. REV. 1, 1-2 (1893). If a grantor thought he had a fee simple and attempted to convey it, but in actuality he only had a fee tail, then the buyer could simply "suffer a common recovery" and thereby convert the fee tail to a fee simple. BIANCALANA, *supra* note 31, at 260.

[41] (1605) 77 Eng. Rep. 311, 312-13, 6 Co. Rep. 40 a, 40-41 (KB).

[42] *Id.* (affirming use of common recovery to convert fees tail into fees simple).

[43] Or, "dead hand" in Law French, an archaic language descended from Norman French that was once used in English courts. *See Mortmain*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[44] *See* Eileen Spring, Comment, *The Strict Settlement: Its Role in Family History*, 41 ECON. HIST. REV. 454, 454 (1988) ("The strict settlement followed an age in which landowners were relatively free to do as they wished about estates and families, entails having become barrable about the end of the fifteenth century.").

[45] *Id.* at 455; *see also* BAKER, *supra* note 25, at 313-14.

[46] SPRING, *supra* note 19, at 75-77 (describing strict settlements and their evolution). The actual effects of land being reorganized with each generation created a lucrative amount of work for the lawyers who drafted these grants. Perhaps the most famous example is Orlando Bridgeman, among whose most famous conveyances was a devise of land for the twenty-second Earl of Arundel, which led to the creation of the RAP in the *Duke of Norfolk's Case* in 1672. *See* Shrutarshi Basu, Nate Foster, James Grimmelmann, Shan Parikh & Ryan

would continue in the same family perpetually, giving effect to the donor's desires.[47] As before, the strict settlement turned the power of free disposition in the direction of donors by requiring renewal with each generation and thus providing an ongoing balance between control over the inheritance and some flexibility for the living generations that possessed it.[48]

3. The End of the Fee Tail

Although the colonial American legal system broadly adopted the English laws of property, including the fee tail,[49] after the American Revolution, many fledgling states abolished the fee tail.[50] Some have attributed this abolition to antiaristocratic and antimonarchical sentiments in the former colonies in the wake of the American Revolution. Abolition of the entail proved that states were sufficiently republican in sentiment.[51] Ultimately, many state constitutions provided bans on perpetuities, including fees tail.[52] Today, the last vestige of the fee tail is the tenancy in tail, still possible by statute in Maine, Massachusetts,

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Richardson, *A Programming Language for Future Interests*, 24 YALE J.L. & TECH. 75, 79 n.9; *see also infra* note 77 and accompanying text (discussing *Duke of Norfolk's Case* and origins of RAP).

[47] Sir William Blackstone, the great compiler of English law, provided an appendix of one such example, which formed a vastly complex series of estates and future interests in eight and one-half pages of nearly indecipherable legalese. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES, app. II, at ii-xii (Thomas B. Wait & Co. 1807) (1765).

[48] More specifically, the balance at issue was the decision of whether the eldest son of the father who was the life tenant could refuse to accept present possession of and income from a life estate and instead wait until his father died and he became the tenant in fee tail, and then suffer a common recovery to get a fee simple. There was some ability to tailor the strict settlement documentation to a particular family's circumstances, but practically speaking, the same family dynamics that kept the strict settlement rolling forward at each generation added expectations that the arrangement would stay the same for extended periods of time. *See supra* Section I.A.2.

[49] This push towards abolition of fee tail was especially true in southern colonies. *See* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 48-56 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf, Inc. 1973) (1840).

[50] *See generally* Jefferson, *Drafts*, *supra* note 37; Jefferson, *Autobiography*, *supra* note 37 (describing debates over presence of fee tail system in American states after American Revolution).

[51] *See* Claire Priest, *The End of Entail: Information, Institutions, and Slavery in the American Revolutionary Period*, 33 LAW & HIST. REV. 277, 277-78 (2015).

[52] *See* ARK. CONST. of 1874, art. II, § 19; CAL. CONST. of 1849, art. XI, § 16; FLA. CONST. of 1838, § 24; MONT. CONST. of 1889, art. XIX, § 5; NEV. CONST. art. 15, § 4; N.C. CONST. of 1776, art. XXIII; OKLA. CONST. art. II, § 32; PA. CONST. of 1776, ch. II, § 37; TENN. CONST. of 1796, art. 11, § 23; TEX. CONST. of 1836, § 17; VT. CONST. of 1777, ch. II, § XXXIV; WYO. CONST. art. 1, § 30. Intriguingly, many of these states track with those that began as Spanish, not English, colonies, including Florida, Texas, and California. Spanish law, as a civil law system that descended from Roman law, never recognized anything completely analogous to the English fee tail. *See* 2 JOHN BOUVIER, INSTITUTES OF AMERICAN LAW 224-25 (Philadelphia, Robert E. Peterson & Co. 1854) (noting dissimilarity between fees tail and property sturctures under Roman law).

and Rhode Island.[53] Although they are capable of existing by law, they are so uncommon that the last cases to have dealt with them in Massachusetts and Maine occurred in the late nineteenth century, with cases therein cited from the eighteenth century,[54] and no case from Rhode Island has ever dealt with this concern. As for England, by the nineteenth century, Parliament codified the dismantling of fees tail with the Fines and Recoveries Act of 1833, which simplified converting fees tail to fees simple.[55] The fee tail finally met its end in England with the Law of Property Act, which expressly abolished the fee tail in 1925.[56]

B. *From Fees Tail to Uses and the Rule Against Perpetuities*

The later history of perpetuities, as it approaches the modern concern of perpetual trusts, merges with the law of trusts. The story of trusts derived not from legal doctrines, as the fee tail, but rather from an extralegal arrangement that was recognized and enforced only in equity courts in England. The story of

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[53] *See* 2 DAVID A. THOMAS, THOMPSON ON REAL PROPERTY § 18.04 (2022); *see also* MASS. GEN. LAWS ch. 183, § 45 (2022) ("A person seized of land as tenant in tail may convey such land in fee simple by a deed in common form, as if he were seized thereof in fee simple; and such conveyance shall bar the estate tail and all remainders and reversions expectant thereon."); ME. STAT. tit. 33, § 156 (2022) ("A person seized of land as a tenant in tail may convey it in fee simple. . . . When land is owned by one person for life with a vested remainder in tail in another, they may by a joint deed convey the same in fee simple. Such conveyances bar the estate tail and all remainders and reversions expectant thereon."); 34 R.I. GEN. LAWS § 34-4-14 (2022) ("All lands held in fee tail shall be liable for the debts of the tenant in tail in his or her lifetime like estates in fee simple; and when sold on execution, or when sold by guardians, the creditor or purchaser shall hold the lands in fee simple, but this shall not extend to lands in which the debtor has only an estate tail in remainder."). Although some sources add Delaware to this list, the statute has since been repealed. *See In re* Reeves, 92 A. 246, 247 (Del. Ch. 1914), *aff'd*, 94 A. 511 (Del. 1915).

[54] *See* Whitcomb v. Taylor, 122 Mass. 243, 246-48 (1877); Holland v. Cruft, 69 Mass. (3 Gray) 162, 186-87 (1855) ("If it could have any effect by way of estoppel, it must be upon the contingency that the event should happen upon which the assignor's right as a remainder would become a tenancy in tail in actual possession, by the death of the tenant to the freehold during his own life. As that event did not happen, the assignment could have no effect."); Willey v. Haley, 60 Me. 176, 177-78 (1872) ("By the first section of this statute, a tenant in tail may, by a deed for good and valuable consideration, sell his estate tail, to be holden by the purchaser in fee-simple." (quoting Williams v. Hichborn, 4 Mass. (3 Tyng) 189, 195 (1808)).

[55] Fines and Recoveries Act 1833, 3 & 4 Will. 4 c. 74, § 15 (UK) ("[E]very actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of for an estate in fee simple absolute. . . ."); *see* Ruhl, *supra* note 31, at 137 ("By the nineteenth century the fee tail was so disfavored by so many—including the aristocracy who by then saw the value in free alienation—that Parliament codified and simplified the disentailing process in the Fines and Recoveries Act of 1833.").

[56] Law of Property Act 1925, 15 & 16 Geo. 5 c. 20, § 130(4) (UK) ("[A]n entailed interest . . . shall devolve as an equitable interest, from time to time, upon the persons who would have been successively entitled thereto as the heirs of the body. . . ."); *see* Ruhl, *supra* note 31, at 137.

the definition of "perpetuities" stems from attempts to create other forms of perpetual grants. The fee tail itself, in its evolution from the thirteenth century through the judicial creation of the common recovery and strict settlement, is one early form of the dispute between perpetual control and judicial intervention, but such a dispute was far from ended by the mere creation of common recovery schemes.

1. Early Restrictions on Perpetuities

The limitations of the fee tail by way of common recovery meant the end of full and unfettered control by donors, but new legal tools arose for new attempts at unfettered dynastic control by donors in the early sixteenth century. The 1535 Statute of Uses and the 1540 Statute of Wills stand as the bases of the unique Anglo-American system of inheritance and as the origins of the next phase of the struggle between power of the disposition of an estate and the judicial decisions that limit it.[57] Donors used the freedom of disposition that the statutes provided to effectively reform the fee tail by creating grants through wills and trusts,[58] which were matters of equity rather than common law,[59] to respond to the common recovery, effectively reform the fee tail, and imitate the perpetual control that the fee tail had once given.

An initial attempt to use the power of these statutes to create a modified fee tail was the grant of a remainder to the heirs of the holder of a life estate. The

[57] *See* Statute of Uses 1535, 27 Hen. 8 c. 10 (Eng.); Statute of Wills 1540, 32 Hen. 8 c. 1 (Eng.); *see also* BAKER, *supra* note 25, at 228, 287 (discussing push for legal reform in mid-seventeenth century, and adoption of primogeniture in Medieval England); John C. Fitzgibbons, Comment, *An Analysis of the History and Present Status of American Wills Statutes*, 28 OHIO ST. L.J. 293, 297 (1967) ("Thus, from the onset of feudalism until 1540, when the first wills act was passed, wills concerning land were entirely abolished in England, except for some local customs." (footnote omitted)); John V. Orth, *Wills Act Formalities: How Much Compliance Is Enough?*, 43 REAL PROP. TR. & EST. L.J. 73, 76 (2008) ("The original Wills Act of 1540 was part of the political settlement that accompanied the attempt by . . . Henry VIII to do away with uses." (footnote omitted)); David J. Seipp, *Trust and Fiduciary Duty in the Early Common Law*, 91 B.U. L. REV. 1011, 1014-18 (2011) (outlining "medieval use[s]" and their enforcement at common law); David T. Smith, *The Statute of Uses: A Look at Its Historical Evolution and Demise*, 18 CASE W. RSRV. L. REV. 40, 40 (1966) ("The Statute of Uses was passed by the English Parliament in 1535 . . . . This enactment, the apex of legislative attempts to control conveyances to uses, is probably the most important piece of legislation dealing with English land law." (footnote omitted)). *See generally* Jefferson, *Pendleton*, *supra* note 37 (comparing and praising Anglo-Saxon inheritance in favor of Norman-inspired feudal land law).

[58] *See* GRAY, *supra* note 23, § 141.3-.6, at 140-41 (describing attempts to take advantage of Statute of Uses to render such remainders indestructible and circumvent common law restrictions).

[59] *See Equity*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The system of law . . . originating in the English Court of Chancery and superseding the common law . . . ."); Seipp, *supra* note 57, at 1011 ("[F]iduciary duties grew up outside the common law in a separate court of chancery with the law of trusts and trustees, only being incorporated a century and a half ago with the fusion of law and equity.").

most notable application of the rule curtailing such grants, though not the rule's origin,[60] is *Shelley's Case*,[61] which created the now rarely cited yet aptly named Rule in Shelley's Case and held that a life estate with a remainder to the life tenant's heirs merged into a fee simple.[62] Similarly, the perpetual freehold, effectively a dissected fee tail, granted a life estate with the remainder for life to successive sons, eldest to youngest, then to grandsons, then great-grandsons, and so on for as long as the patience of the drafter (and his supply of parchment) continued. So similar was this grant to the original fee tail in its effect that it "was curtailed in the 1585 case *Lovelace v. Lovelace*."[63]

Another iteration was the use of contingent remainders that could, in theory, place an effective hold on property indefinitely until such remainder vested. Now a mere footnote in the law of property, a rule that contingent remainders could be destroyed if they had not yet vested, as laid down by Sir Edward Coke's report in *Chudleigh's Case*[64] in 1594 and *Archer's Case*[65] in 1597, reasoned that

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[60] Provost of Beverly's Case YB 40 Edw. 3, fol. 9a, Hil., pl. 18 (1366) (Eng.) (creating one of earliest applications of limitations on perpetual successive life estates); *see* JOSHUA WILLIAMS, PRINCIPLES OF THE LAW OF REAL PROPERTY 196-97 (1845) (analyzing facts of *Provost of Beverly's Case* as they relate to fee tail estates).

[61] (1581) 76 Eng. Rep. 199, 206; 1 Co. Rep. 88 b, 93 (KB); *see* A.W. BRIAN SIMPSON, LEADING CASES IN THE COMMON LAW 13-45 (1996) (describing *Shelley's Case* and its relation to politics and law in Elizabethan England).

[62] Sir Edward Coke affirmed and restated this rule as well-settled law by the early seventeenth century. *See The Application of the Rule in Shelley's Case*, 10 U. CHI. L. REV. 344, 344-45 (1943); *The Rule in Shelley's Case Has Been Abolished*, 4 FORDHAM L. REV. 316, 317 n.8 (1935); *see also* 2 BLACKSTONE, *supra* note 47, at 201. Some have debated the true motivation behind this rule, but its effect still limited the power of the donor of the land by judicial decision. *See* John V. Orth, Observation, *Requiem for the Rule in Shelley's Case*, 67 N.C. L. REV. 681, 682-86 (1989). *See generally* David A. Smith, *Was There a Rule in* Shelley's Case*?*, 30 J. LEGAL HIST. 53 (2009). This rule's once-great importance is evinced by the books that have been written attempting to explain the case. *See generally, e.g.*, RICHARD PRESTON, A SUCCINCT VIEW OF THE RULE IN SHELLEY'S CASE (Forgotten Books 2018) (1794) (discussing effects, development, and application of Rule in Shelley's Case).

[63] Stake, *supra* note 27, at 417; *see* Lovelace v. Lovelace (1584) 78 Eng. Rep. 304, 304; Cro. Eliz. 40, 40 (CB).

[64] (1594) 76 Eng. Rep. 270, 271-72; 1 Co. Rep. 120 a, 120 b-121 a (KB); *see also* Siegel, *supra* note 22, at 445 n.31 ("At first, the courts met the perpetuities problems arising from executory interests by subjecting these interests to the destructibility rules governing remainders."). Coke's approach to legal writing has been described as "constantly wandering off at tangents . . . like a helpful old wizard, anxious to pass on all his wisdom before he died, but not quite sure where to begin or end." BAKER, *supra* note 25, at 200. Otherwise put, read Coke's reports with caution.

[65] (1597) 76 Eng. Rep. 146, 146; 1 Co. Rep. 66 b, 66 b (KB); *see also* Albert M. Kales, *The Later History of the Rule of Destructibility of Contingent Remainders*, 28 YALE L.J. 656, 656-57 (1919) ("It became settled in *Chudleigh's Case* and *Archer's Case*, at the end of the sixteenth century, that the rule of destructibility would apply to contingent remainders created by way of use or devise." (footnotes omitted)); EDWARD BURTENSHAW SUGDEN, A PRACTICAL TREATISE OF POWERS 30-31 (London, R. Wilks 1808) (analyzing relationship between *Chudleigh's Case* and *Archer's Case*).

the law favors the vesting of estates open to contingencies for any period of time and limited such a grant.[66] The destructibility of contingent remainders limited the power to create an estate that would not vest within a reasonable time, though it did not set a given name for what the reasonable time should be.[67] Once again, judicial intervention prevented unreasonably lengthy control over estates.[68]

2. Later Restrictions on Perpetuities

Just as the Wills Act had granted a new-found power to devise land into life estates and executory interests with varied perpetual effects, so too did the Statute of Uses allow such grants by a donor in trust for another.[69] In *Chudleigh's Case*, Sir Edward Coke stated that a use was a "trust or confidence."[70] Reversing that decision in part, *Pells v. Brown*[71] in 1620 held that any rules of destructibility that would apply to a grant of land at law did not apply to the law of uses, claiming that such legal transfers were indestructible by common law limitations.[72] Despite *Pells*'s limitation, trusts had thus entered the menu of possibilities for reviving an equitable counterpart of the fee tail. The first attempt to clarify this law was by the Court of Chancery in *Purefoy v.*

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[66] *See* Roberts v. Roberts (1613) 80 Eng. Rep. 1002, 1009; 2 Bulstrode 124, 131-32 (KB); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 25.5 note on present status of the destructability rule (AM. L. INST. 2011). *Chudleigh's Case* may be the origins of the word "perpetuity" as a legal term of art. *See* Charles E. Cullen & Leslie H. Fisher, *The Modern Rule Against Perpetuities and Legal Contingent Remainders in Missouri*, 22 WASH. U. L.Q. 31, 33-34 (1936) ("The origin of the term 'perpetuity' is obscure. It was used in *Chudleigh's Case* and while it cannot be assumed that the term was never used on any previous occasion, Mr. Holdsworth, in an article, *An Elizabethan Bill Against Perpetuities*, says that the case directed public attention to the topic." (footnotes omitted)).

[67] GRAY, *supra* note 23, § 186, at 177; Siegel, *supra* note 22, at 445.

[68] *See* Manning's Case (1609) 77 Eng. Rep 618, 620; 8 Co. Rep. 94 b, 95 a (KB); *see also* THOMAS JEFFERSON, JEFFERSON'S LEGAL COMMONPLACE BOOK 94, 167 (David Thomas Konig & Michael P. Zuckert eds., Princeton Univ. Press 2019) (c. 1766); Haskins, *supra* note 33, at 33-34 ("Before *Manning's Case* was decided the owner of a term of years who attempted to divide the term into a life estate in one person and what appeared to be a remainder in another, would find that the remainder was void.").

[69] *Chudleigh's Case*, 76 Eng. Rep. at 273; 1 Co. Rep. at 121 b; *see* J.H. Baker, *Coke's Note-Books and the Sources of His Reports*, 30 CAMBRIDGE L.J. 59, 71-72 (1972) (describing Coke's original report on *Chudleigh's Case*); Allen D. Boyer, *Light, Shadow, Science, and Law*, 92 MICH. L. REV. 1622, 1624 n.8 (1993) (noting role of *Chudleigh's Case* in "clarifying the Statute of Uses"); *see also* Thomas E. Simmons, *Decanting and Its Alternatives: Remodeling and Revamping Irrevocable Trusts*, 55 S.D. L. REV. 253, 254 (2010) ("Trusts are arguably English lawyers' greatest idea and creation . . . . Today, trusts are widely used as an infinitely flexible property and estate planning tool." (footnote omitted)).

[70] *Chudleigh's Case*, 76 Eng. Rep. at 273; 1 Co. Rep. at 121 b.

[71] (1620) 79 Eng. Rep. 504; Cro. Jac. 590 (KB).

[72] *Id.* at 506; Cro. Jac. at 593; *see also* Stake, *supra* note 27, at 417; George L. Haskins, *"Inconvenience" and the Rule* for *Perpetuities*, 48 MO. L. REV. 451, 453 (1983); *see also* GRAY, *supra* note 23, § 159, at 152-53.

Rogers[73] in 1670. *Purefoy* limited executory interests' use to twenty-one years, the time for a child to reach the age of majority, after the death of the preceding generation.[74] With this early reference to twenty-one years, the apex of the struggle over perpetual interests begins with an earliest formulation of what would become the Rule Against Perpetuities.

3. The Origins of the Rule Against Perpetuities

By the later seventeenth century, the RAP evolved from cases such as *Purefoy* "to foster the alienation of land, that is, the transfer of full ownership in land in fee simple absolute."[75] This body of law was later clarified in 1682 with the *Duke of Norfolk's Case*,[76] which held that a grant included multiple shifting executory interests not certain to occur until generations later and that "a future interest" is only "good" if it "necessarily would vest or fail during or at the end of a life in being."[77]

The *Duke of Norfolk's Case* left some points of law unanswered, which later cases used to form the RAP as understood today. In 1732, *Stanley v. Leigh*[78] ruled that the perpetuity is limited to the lives which are in being (i.e., alive) at the creation of the grant plus a reasonable time thereafter.[79] In 1736, *Stephens v.*

[73] (1670) 85 Eng. Rep. 1181; 2 Wms. Saund. 380 (Ch).

[74] *Id.* at 1193; 2 Wms. Saund. at 388. If twenty-one years sounds familiar, it is because this same age, based on the age of majority at the time, would become central to the limitation of the common law against perpetuities. *See* Stake, *supra* note 27, at 417 ("But subsequent cases 'whittled' *Chudleigh's Case* down to the rule of *Purefoy v. Rogers*, which was not up to the task of curbing many dynastic designs." (footnote omitted)).

[75] Robert H. Freilich, *Eliminating Perpetual Trusts Is a Critical Step Towards Alleviating America's Devastating Income Inequality*, 88 UMKC L. REV. 65, 94 (2019). As with common recoveries barring fees tail, the RAP "represent[s] the striking of a complicated and delicate balance between the desirability of free alienability and the imperative that landed estates and family property be preserved." Reid, *supra* note 40, at 262; *see also* Ira Mark Bloom, *The GST Tax Tail Is Killing the Rule Against Perpetuities*, 87 TAX NOTES 569, 570 (2000). The traditional RAP has been the oft-studied subject of property professors and trusts and estates professors ever since. *See infra* Section II.A.

[76] Duke of Norfolk's Case (1682) 22 Eng. Rep. 931, 949; 3 Chan. Cas. 2, 30 (Ch).

[77] Horowitz & Sitkoff, *supra* note 6, at 1777; *see also* Haskins, *supra* note 33, at 21 ("The *Duke of Norfolk's Case* was a clarification of ancient contradictory assumptions, decisions and uncertainties with respect to how long interests in landed property might last."). For a more in-depth scholarly study of the case, see generally Herbert Barry, Note, *The* Duke of Norfolk's Case, 23 VA. L. REV. 538, 543-46 (1937).

[78] (1732) 24 Eng. Rep. 917; 2 P. Wms. 686 (Ch).

[79] *Id.* at 918; 2 P. Wms. at 688; *see* Horowitz & Sitkoff, *supra* note 6, at 1777 ("By 1732, we find in *Stanley v. Leigh* the term 'perpetuity' described as 'a legal word or term of art' meaning 'the limiting [of] an estate . . . in such manner as would render it unalienble longer than for a life or lives in being at the same time, and some short or reasonable time after.'" (alteration in original) (quoting *Stanley*, 24 Eng. Rep. at 917-918; 2 P. Wms. at 688-89)).

Stephens[80] defined a reasonable time to be twenty-one years,[81] the age of majority,[82] for those born after the creation of the grant. The RAP was further clarified in *Cadell v. Palmer*[83] in 1833, which affirmed the various circumstances during which an interest was good during the life of existing persons and twenty-one years thereafter (including the time during which a posthumous child was *en ventre sa mere*).[84] Thus the RAP, as Gray would restate in the following century, was formed.[85] This rule, in its original form as settled by the eighteenth century, did not prevent perpetuities. In fact, it provides an express time frame during which they were unequivocally permitted. Therefore, the RAP was not a categorical invalidation against every contingent future interest (e.g., reversionary interests to grantors' heirs), nor did it invalidate any future interest subject to some uncertainty. Instead, it limited only that which could not be limited to a life in being plus twenty-one years.

C. *From the Rule Against Perpetuities to Modern Trust Law*

For centuries thereafter, the RAP prevented private noncharitable trusts from having overly lengthy durations. Yet the RAP is not the only legal limitation on the duration of trusts that evolved thereafter. Thus the final matter of background is the state of existing trust modification law, beyond the limits of the RAP alone.

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[80] (1736) 25 Eng. Rep. 751; Cases T. Talbot 229 (Ch).

[81] *Id.* at 752; Cases T. Talbot at 232; Horowitz & Sitkoff, *supra* note 6, at 1777 ("Four years later, in *Stephens v. Stephens*, the permissible perpetuities period was clarified as including the minority of a beneficiary, up to twenty-one years, in addition to lives in being."); Les A. McCrimmon, *Gametes, Embryos and the Life in Being: The Impact of Reproductive Technology on the Rule Against Perpetuities*, 34 REAL PROP. PROB. & TR. J. 697, 698-99 (2000) ("As the Rule evolved, courts extended the period of time within which the future interest must vest—first to include any actual period of gestation, and then to include any actual period of gestation . . . plus a gross period of twenty-one years after some life in being." (footnote omitted)).

[82] 1 WILLIAM BLACKSTONE, COMMENTARIES 167, 425-26, 450, 454, 458 (Portland, Thomas B. Wait, & Co. 1807) (1765) (restating twenty-one as age of majority for elected office, voting, oaths, marriage, and guardianship); T.E. James, *The Age of Majority*, 4 AM. J. LEGAL HIST. 22, 23 (1960) ("The reason why twenty-one was selected as the crucial age for majority appeared to depend upon the ancient rules of tenure.").

[83] (1833) 131 Eng. Rep. 859; 10 Bing. 141 (HL).

[84] *Id.* at 860; 10 Bing. at 145; *see Posthumous Child*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A child born after a parent's death. Ordinarily, the phrase *posthumous child* suggests one born after the father's death."); *En ventre sa mere*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("(Of a fetus) in the mother's womb."); *see also* ALFRED F. TOPHAM, TOPHAM'S REAL PROPERTY: AN INTRODUCTORY EXPLANATION OF THE LAW RELATING TO LAND 135 (3d ed. 1921) (explaining formulation of rule devised in *Cadell v. Palmer*).

[85] *See* Kevin William Wright, The History and Future of the Delaware Tax Trap 3 (2020) (unpublished manuscript), https://actecfoundation.org/wp-content/uploads/The-History-and-Future-of-the-Delaware-Tax-Trap.pdf [https://perma.cc/ZU7Z-QJ7E] ("Ultimately, the vesting limitations described in *Cadell* provided the framework for John Chipman Gray's modern American articulation of the [RAP].").

Trust modification began in England with *Saunders v. Vautier*[86] in 1841 which held that trusts can be terminated if all adult beneficiaries consent.[87] *Claflin v. Claflin*,[88] an 1889 Massachusetts case, set the standard rule under U.S. law and gave it its name.[89] Like the English rule in *Saunders*, *Claflin* permits modification but adds a second requirement that such modification cannot be contrary to a material purpose of the settlor.[90] This rule has been adopted in modified form by the Restatement of Trusts and Uniform Trust Code.[91]

Even without the consent of all beneficiaries, a court may permit a trustee to deviate from the terms of the trust if a failure to deviate would impair the accomplishment of the purposes of the trust, based on circumstances not anticipated by the settlor. One of the most famous examples of the application of this doctrine is in *In re Estate of Pulitzer*,[92] which permitted the trustee to deviate from the terms of the Pulitzer trust that compelled investment in the *New York World* newspaper, which had gone bankrupt.[93] This doctrine of equitable deviation, or changed circumstances, applied originally only to administrative terms of a trust, such as investment restrictions, but has since been extended to dispositive terms in most states.[94] It has been used notably to extend the duration

[86] (1841) 49 Eng. Rep. 282; 4 Beav. 115.

[87] *Id.* at 282; 4 Beav. at 116. The Variation of Trusts Act likewise gave power to beneficiaries to modify trusts under the English view that trusts, once irrevocable, belong to the living beneficiaries. *See* Variation of Trust Acts 1958, 6 & 7 Eliz. 2 c. 53 § 1 (UK).

[88] 20 N.E. 454 (Mass. 1889).

[89] *Id.* at 455.

[90] *Id.* at 456; Richard C. Ausness, *Sherlock Holmes and the Problem of the Dead Hand: The Modification and Termination of "Irrevocable" Trusts*, 28 QUINNIPIAC PROB. L.J. 237, 302 (2015) ("In the past, it was difficult for beneficiaries to modify or prematurely terminate irrevocable trusts because courts felt constrained to carry out the deceased settlor's intent as embodied in the trust instrument. This led to a number of problems, including the lack of flexibility.").

[91] UNIF. TR. CODE § 411(b) (UNIF. L. COMM'N 2003); RESTATEMENT (THIRD) OF TRS. § 65(2) (AM. L. INST. 2003) (providing that trust cannot be modified if such modification would be contrary to material purposes). The Restatement, however, provides that the benefits of modification must merely outweigh the material purposes, relaxing the *Claflin* requirement, which was adopted from California's approach. *Id.* § 65 cmt. d; CAL. PROB. CODE § 15403(b) (Deering 2022); *see* Ausness, *supra* note 90, at 302 ("The Uniform Trust Code and the Third Restatement liberalized the rules on modification and termination somewhat, but arguably did not go far enough.").

[92] 249 N.Y.S. 87, 98 (Sur. Ct. 1931), *aff'd mem.*, 260 N.Y.S. 975 (App. Div. 1932).

[93] *See id.*; John H. Langbein, Essay, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1118 (2004) (arguing settlors may be able to use trust terms to prevent modification or termination of trusts, commenting on *Pulitzer* case, and questioning whether *Pulitzer* could have restricted his trust such that investment terms were mandatory).

[94] *See, e.g.*, CAL. PROB. CODE § 15409 (Deering 2022). The Uniform Trust Code allows for the division or combination of trusts under modification and termination rules, provides that the settlor cannot vary the termination or modification of a trust by its own terms, and further provides that the requirement that a trust be for the benefit of the beneficiaries prevents

of trusts that were set to distribute the corpus to the generation of beneficiaries who were not yet born when the trust was created, but who have circumstances that convince courts to continue their income entitlements long past the age of twenty-one rather than distribute a lump sum to them outright.[95] The Uniform Trust Code does require that courts consider the probable intent of the settlor, as the *Claflin* doctrine does, when discussing dispositive terms. However, the Uniform Trust Code provides the interesting avoidance of such terms and does not so require this for a "wasteful" administrative term.[96]

Decanting, a relatively modern doctrine, allows a trustee with discretionary power in the original trust to "decant,"[97] or transfer, trust property to a new trust. Originating this possibility, *Phipps v. Palm Beach Trust Co.*[98] allowed a trustee with discretionary distribution power to use such power to decant trust corpus in further trust for the same beneficiaries.[99] This form of modification requires no court involvement, unlike *Claflin* modification or changed circumstances modification.[100] Many states now have decanting statutes that codify this trustee power, including many of the most trust-friendly states like South Dakota and Delaware.[101] These vary greatly by state, but the Uniform Trust Decanting Act has offered some uniformity. Generally, notice to the trust's beneficiaries is required. The decanting power has been generally used to transfer a trust to a jurisdiction that either has more favorable laws or more favorable administrative features, partially releasing trusts from perpetual control of the settlor. However, such release only occurs when courts interpret decanting through its proper historical framework and when states are willing to provide sufficient incentives to overcome the adverse incentives of corporate trustees to prevent a loss in fees from trusts from being broken up.[102]

Lastly, powers of appointment provide a donee a nonfiduciary power to decide to whom property passes.[103] These powers provide flexibility for long-

any unreasonable administrative restraints on the use of trust property. UNIF. TR. CODE §§ 105(b)(4), 412, 417 (UNIF. L. COMM'N 2003).

[95] *See, e.g.*, *In re* Riddell Testamentary Tr., 157 P.3d 888, 891-92 (Wash. Ct. App. 2007).

[96] UNIF. TR. CODE § 412.

[97] The term "decanting" derives from wine decanting, a process that involves pouring wine from its bottle into a glass container to remove sediment, and serves as an apt metaphor for transferring a trust. *See generally When, and Why, Should You Decant Wines?*, JJ BUCKLEY FINE WINES (May 25, 2021), https://www.jjbuckley.com/wine-knowledge/blog/when-and-why-should-you-decant-wines-/1227 [https://perma.cc/2HNJ-N9TT].

[98] 196 So. 299, 301 (Fla. 1940).

[99] *See* Simmons, *supra* note 69, at 255-57.

[100] *See* UNIF. TR. DECANTING ACT § 7(b) (UNIF. L. COMM'N 2015) ("Except as otherwise provided in this [act], an authorized fiduciary may exercise the decanting power without the consent of any person and without court approval.").

[101] *See* DEL. CODE ANN. tit. 12, § 3528 (2023); S.D. CODIFIED LAWS § 55-2-15 (2023).

[102] *See* John Fritz, Comment, *The Wild, Wild West: The Mechanics and Potential Uses of Trust Decanting*, 19 WYO. L. REV. 327, 346 (2019) (discussing advantages of decanting trust into Wyoming or another favorable jurisdiction).

[103] *See infra* Section III.C.4.

term control over assets.[104] Using a nongeneral power can allow for the appointment of the property in further trust or outright, which gives each generation control over the trust. The owner of a nongeneral power is not treated as an owner for tax purposes, so the value of the power is not treated as their property either for federal taxes or for debt collection, and thus can be used to appoint in further trust or appoint another nongeneral power, providing a balance between flexibility and control.[105] This balance between flexibility and control has been the hallmark of centuries of legal history since the advent of the fee tail and, in turn, must inform an understanding of perpetual trusts today.

II. PERPETUAL TRUSTS AND THE PROBLEM OF PERPETUAL CONTROL

Having surveyed the history of perpetuities from the start of the fee tail, its demise through common recovery, and its revival through strict settlement, through the many iterations of estate planning to effectuate the same dynastic control as the fee tail, the next concern is issues of perpetuities in their modern form. While a typical law school Property course may lead one to believe that the fee tail and all that its history surveys is an unnecessary and complicated footnote to the common law, the struggle evinced from 1285 through the eighteenth century, between families attempting to establish control over generations of an estate and judicial decisions that have limited this power is far from over. The more recent history and current use of the perpetual trust reflect this same struggle, just as potential solutions to the issues raised here will stand against the background of the fee tail. Beginning with the repeal of the RAP in many states and its partial though significant effect on the rise of perpetual trusts, this section will trace lines of argument that have explored the many issues inherent in a trust that has a potentially infinite duration.

A. *Modern Perpetuities and Perpetual Trusts*

The RAP, as it has been applied since its advent in the late seventeenth century, maintains two key policy goals. First, it looks to keep property alienable, while a traditional perpetuity, whether a fee tail or some form of executory interest of no limited duration, inhibits the sale of property. Simply put, if an estate is held subject to a condition that may end the present interest of the holder, it will be worth far less than if the same land were owned in fee simple. This first purpose is, generally, of little concern to the law of trusts and

[104] RESTATEMENT (THIRD) OF TRS. § 50 cmt. a (AM. L. INST. 2003). Powers of appointment effectively create fee simple ownership in action and permit the donee wide discretion within their terms. *See* John H. Martin, *The Dynasty Trust in Ohio: A Short, Rigid, or Uncertain Reign*, 43 U. TOL. L. REV. 53, 58 (2011) ("A power of appointment provides a predictable mechanism that can be employed for . . . adding beneficiaries (spouses or partners of descendants, for example), withholding distributions, skipping beneficiaries entirely, or allowing benefits to be diverted, possibly to charity."); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 22.1 cmt. a (AM. L. INST. 2011).

[105] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 22.1 cmt. a.

was of more concern in the age of great estates in land that tied large parcels of property in ways that rendered them unmarketable.[106] Second, the RAP limits mortmain control over wealth. This concern is the far more important consideration insofar as the historical application of the rule is applied to the modern law of perpetual trusts. Today, trusts frequently impose restraints on beneficiaries' power to alienate their beneficial interests, but no specific property is left unmarketable because trustees have ample powers to shift investments from one type of asset to others as market opportunities arise. Yet, the terms of these same trusts bind wealth to the will of the trust's settlor.

1. The Repeal of the Rule Against Perpetuities

In combating mortmain control, the RAP remained in force for centuries and continues to govern wills and trusts that came into effect before its repeal for new dynastic trusts, but its problems became more evident over time. These same problems led not only to the rule's reform but also to its eventual abolition in many U.S. jurisdictions today. The central problems with the rule that practitioners and scholars described are threefold, though one could dismiss aspects of them as ideological and partisan. First, it is both overinclusive and underinclusive in its attempt to limit perpetual grants in land or trusts because it ends grants with little nuance and harsh results.[107] Second, the assumptions required to apply the rule present a bewildering array of illogical results, from the fictions of the "fertile octogenarian" and "precocious toddler"[108] to the "magic gravel pit" and "never-ending war."[109] Third, the RAP's frustrating

[106] Nichols v. Eaton, 91 U.S. 716, 730 (1875) (permitting trust income to cease if beneficiary of such trust became bankrupt or insolvent); Broadway Nat'l Bank v. Adams, 133 Mass. 170, 173 (1882) (permitting trust income that could not be alienated by beneficiary or beneficiary's creditors); W. Richard Eshelman, Note, *Trust Devices Preventing Alienation of the Beneficiary's Equitable Interest*, 51 DICK. L. REV. 109, 109 (1947) ("[R]estraints on alienation are valid if attached to certain equitable interests, but are invalid if attached to corresponding legal interests."); Note, *Power of the Beneficiary To Terminate a Spendthrift Trust for a Stated Time*, 12 MICH. L. REV. 55, 56 (1913).

[107] *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(a)(2) cmt. 2 (UNIF. L. COMM'N 1990) (adopting wait-and-see approach, presumably to mitigate harshness of common law rule).

[108] *See* Banks v. Gaite (*In re* Gaite's Will Trs.) [1949] 1 All ER 459 at 460 (Ch) (assuming that girl under five could have children for purposes of RAP violations); Jee v. Audley (1787) 29 Eng. Rep. 1186, 1187; 1 Cox 324, 325-26 (Ch) (assuming that woman over seventy could still have children for purposes of RAP violations); *see also* W. Barton Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent*, 48 AM. BAR ASS'N J. 942, 942 (1962).

[109] Brownell v. Edmunds, 209 F.2d 349, 351 (4th Cir. 1953) (ruling it was uncertain that World War II would end during period allowed by RAP); Tullett v. Colville (*In re* Wood) [1894] 71 LT 413 at 416 (Ct. App.) (assuming gravel pit could never run dry for purposes of RAP violations); *see also* SITKOFF & DUKEMINIER, *supra* note 20, at 898-900; Daniel M. Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?*, 56 MICH. L. REV. 683, 699-701 (1958).

complexity creates a "net . . . for the unwary"[110] and "traps for the . . . draftsman."[111] Recognizing the issues inherent in the rule, one may ask how the modern reform of a complex, frustrating, and baffling rule could rightly be called an issue. It becomes an issue, in brief, when reform becomes synonymous with abolition with no consideration given to how a replacement or workaround to the rule's intention could be affected.

The first reform came as "self-help" in the manner of saving clauses, which provided contingencies in grants of land or trusts if any grant therein would otherwise violate the RAP. Next, the cy pres[112] doctrine authorized a court, either by a prior decision or by statute, to modify a trust that violates the rule.[113] Finally came the great bellwether of the modern RAP: the wait-and-see rule. This new form of the rule was no longer a rule of voiding grants or trusts ab initio.[114] Otherwise put, the rule as laid down in the *Duke of Norfolk's Case* and in Gray's restatement tests whether an interest is guaranteed to vest from the start, while the wait-and-see approach sets out a time in the future during which the interest must vest or definitely fail to vest before a court will strike it down as a perpetuity.[115] Although W. Barton Leach's *Perpetuities in Perspective: Ending the Rules Reign of Terror* "is generally given credit for beginning this new movement [away from the common law RAP]," it "actually began five years earlier with the enactment of the Pennsylvania Estates Act of 1947," which was the first to adopt the wait-and-see principal.[116] Most states that maintain the

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110 GRAY, *supra* note 23, at xi. Thus, even the legal scholar most associated with the RAP recognized its unwavering complexity.

111 Lucas v. Hamm, 364 P.2d 685, 690 (Cal. 1961) (holding lawyer who failed properly to draft estate plan that led to smaller share for recipients of such estate plan was not liable for malpractice).

112 Or, "as near as" in Law French. *Cy Pres*, BLACK'S LAW DICTIONARY (11th ed. 2019).

113 *See* T.K. Carroll, *Future Interests—Rule Against Perpetuities—Cy Pres Applied To Modify an Interest Violating the Rule*, 61 MICH. L. REV. 609, 610-11 (1963) (noting use of cy pres doctrine to modify grants that violate limits of RAP); Lewis M. Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707, 733 (1955) (describing use of cy pres doctrine to remedy RAP defects in charitable trusts); David W. Swanson, *Rule Against Perpetuities—Recent Legislation in Massachusetts, Maine and Connecticut*, 54 MICH. L. REV. 723, 724 (1956) ("The second section of these statutes is modeled after the English Law of Property Act of 1925 and is a limited introduction of the cy pres doctrine which the courts apply to a charitable trust that fails. Some writers have suggested a full application of the cy pres doctrine . . . .").

114 *See* Horowitz & Sitkoff, *supra* note 6, at 1780 ("In a state that has adopted wait-and-see, the court will wait and see what actually happens; it will not invalidate an interest because of what might happen."); *see also* Garment, *supra* note 1 (describing South Dakota as tax haven due to state laws allowing perpetual trusts); Madoff, *supra* note 4 (suggesting form of RAP that taxes estates after passing to two generations).

115 *See* W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 730 (1952); *see also* Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1306 (2003).

116 Laurence M. Jones, *Reforming the Law—The Rule Against Perpetuities*, 22 MD. L. REV. 269, 278 (1962).

RAP have since embraced the wait-and-see approach,[117] and this approach has entered the Restatement of Property.[118] In this reform, no problem of perpetuities remained. Despite some criticism, the reformed rule ensured that perpetual grants were still void but avoided the complexities and illogical outcomes of the original RAP first laid down in the *Duke of Norfolk's Case*,[119] later refined by English case law, and restated by Gray.[120]

Even this reform would not go far enough for some states. Idaho, South Dakota, and Wisconsin "for reasons that are not entirely clear" abolished their RAPs "by 1957, 1983, and 1969 respectively."[121] By the 1990s, based on changes in taxation, further states abolished their rule.[122] While the 1999 Uniform Statutory Rule Against Perpetuities, led by Lawrence Waggoner of the University of Michigan, adopted the fixed wait-and-see approach of ninety years, it was too late for the many states that had in abolished their rule.[123]

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[117] That the wait-and-see approach left uncertain the validity or invalidity of a future interest was a feature, not a bug, because of malpractice. The old RAP let malpractice liability fall on the drafter as soon as the grant came into effect and could be litigated, while wait-and-see meant that most unanticipated perpetuities problems never happened and those that did eventuate, rendering future interests invalid, happened long into the future when the drafter might well be since deceased or not worth suing. *See* Dukeminier & Krier, *supra* note 115, at 1310 n.26 (describing ninety-year suspension of RAP as freeing lawyers of potential malpractice liability because duration spans lawyer's career).

[118] RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 1.4 (AM. L. INST. 1983) (restating rule such that interest only fails RAP if it does not vest, not if it might not vest); Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle? The Disintegration of the Restatement of Property*, 79 BROOK. L. REV. 681, 692 (2014) (describing debate surrounding wait-and-see approach prior to its endorsement by American Law Institute "with the publication of *Restatement (Second) of Property: Donative Transfers*").

[119] (1682) 22 Eng. Rep. 931, 933; 3 Chan. Cas. 1, 3 (Ch).

[120] *See* Stephens v. Stephens (1736) 25 Eng. Rep. 751, 752-53; Cases T. Talbot 229, 231-33 (Ch); Stanley v. Leigh (1732) 24 Eng. Rep. 917, 918-21; 2 P. Wms. 686, 689-97 (Ch); *see also* Barry, *supra* note 77, at 543-45.

[121] Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2473 (2006); *see also* Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 550 (1964) ("In Wisconsin there are apparently no real barriers to the creation of trusts lasting far longer than the common-law period of perpetuities."); W. Barton Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973, 974-75 (1965) ("[F]or most practical purposes, there is no Rule Against Perpetuities or related rule in Wisconsin. Professor Casner concludes that the same situation may exist in Idaho." (footnote omitted) (citing 1 A. JAMES CASNER, ESTATE PLANNING 675 (3d ed. 1961)).

[122] *See* Bloom, *supra* note 75, at 569 ("The Rule Against Perpetuities is under siege in the United States. In the past three years, eight states have repealed the rule, and many other states are seriously considering its repeal."); *see also* Hemel, *supra* note 1 (noting relationship between Generation-Skipping Transfer Tax ("GST") and abolition of RAP). Yet another attempt to save the rule came with the 2011 Restatement of Property by the American Law Institute, which proposed "a new perpetuities rule with a two-generation wait-and-see period followed by reformation." *See* Horowitz & Sitkoff, *supra* note 6, at 1781.

[123] *See* Horowitz & Sitkoff, *supra* note 6, at 1779.

2. The Rise of the Generation-Skipping Transfer Tax

The repeal of the RAP was not the only factor in the rise of perpetual trusts. The problem came as a two-fold occurrence in the mid-1980s with the abolition of the rule altogether in some states prior to 1986, the enactment of the Tax Reform Act of 1986,[124] with its Generation-Skipping Transfer Tax ("GST"), and the subsequent rush to abolish the rule between 1987 and 1996 as a result of increases in the GST's exemption limit.[125] The GST initiative of the 1980s, though not the start of the demise of the RAP, accelerated its abolition and provided an inadvertent incentive for states to remove their rule.[126] Other tax changes to increase the GST's limit only provided increasing momentum to the drive to repeal state rules against perpetuities and allow dynasty trusts.[127]

In 1986, Congress passed the GST to prevent the exploitation of an estate tax loophole.[128] The GST allows inheritance tax to be paid two or more generations removed from the transferor—hence skipping at least one generation. As in the days of the arms race between fees tail and perpetual grants as against common recovery and the RAP, the GST sought to avoid estate planning techniques such as direct transfers from grandparents to grandchildren, as attempts to avoid taxable transfers to and then from the intervening generation of children.[129] The GST ended this exploitation.[130] This closed a loophole in the estate tax by

[124] *See* Tax Reform Act of 1986, Pub. L. No. 99-514, §§ 1431-33, 100 Stat. 2085, 2717-32 (imposing tax on "every generation-skipping transfer"); *see also* 26 U.S.C. § 2611(a) ("For purposes of this chapter, the term 'generation-skipping transfer' means (1) a taxable distribution, (2) a taxable termination, and (3) a direct skip."); 26 U.S.C. § 2612(a) (defining taxable terminations); 26 U.S.C. § 2613(a) (defining persons eligible for "skipping" under GST).

[125] *See* Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 371-74 (2005). Shielding $26 million from all federal estate taxation for a married couple is, by reasons of common sense, quite a motivator. The other winners in dynasty trust are the corporate trustees who get reasonable compensation far longer into the future than they would otherwise, based on small percentages of larger and larger accumulations of trust corpuses due to savvy investing, with far greater trustee powers and trustee discretion. *See id.*

[126] *See generally id.* (arguing rise of perpetual trusts since 1980s is better explained by settlors' desire for tax avoidance than by dynastic impulses).

[127] *See id.* at 371.

[128] *Id.* (describing motivations behind passage of GST).

[129] *See Limited Power of Appointment*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A power of appointment that either does not allow the entire estate to be conveyed or restricts to whom the estate may be conveyed . . . ."); *see also* A. James Casner, *Estate Planning—Powers of Appointment*, 64 HARV. L. REV. 185, 185-86 (1950) (defining powers of appointment). *See generally* Nathan R. Brown & Brandon A.S. Ross, *Diagnosing the GST Tax Status of a Trust*, PROB. & PROP. MAG., July/Aug. 2017.

[130] *See* Sitkoff & Schanzenbach, *supra* note 125, at 371 n.42 ("Congress attempted to close the successive-life-estates loophole in the Tax Reform Act of 1976, but the 1976 scheme was later repealed retroactively."); *cf.* Dukeminier & Krier, *supra* note 115, at 1317. ("[The] absence of interest in perpetual trusts prior to the GST tax gives rise to the troubling likelihood

ensuring that property would be subject to tax as it passed through each generation, even if it would otherwise have avoided estate taxes because it was held in trust.[131] Once again, the enactment of the GST, like the gradual repeal of the RAP, invites the question of why this would be an issue. In brief, the GST prevented tax dodges that attempted to skip generations through an exemption that has increased for "originally $1 million" combined between spouses, which increased a combined spousal limit of just under $26 million today.[132] As such, a trust that lasts forever with beneficiaries who did not themselves live forever can contain funds up to the "amount of the exemption, free from transfer taxes" and can "endure as long as state perpetuities law permits."[133] The motivation that the federal government will never get a penny of this $24 million is the real draw of the dynasty trust, far greater than the fact that descendants to the umpteenth generation who will bear some relationship will eventually get that money. Today, "[c]onditions for leaving large sums have never been better" precisely because "Congress has not closed an estate-planning loophole in over thirty years."[134]

After the GST, Delaware became the first state to begin a rush toward the abolition of the rule. Long proud of their leadership role in corporate law, the state was quick to attempt to create an equal status in the realm of trust law.[135] This tax makes a perpetuity a valuable asset beyond the mere control of wealth. These trusts would provide mortmain control for the settlor of the trust and could permit the trust to avoid the burden of wealth taxation forever, becoming the most-favored jurisdiction for creating a large private trust as a result of the GST's enactment, the RAP's repeal in many jurisdictions, and the escalation of the GST's exemption amount, which explains the momentum of the post-1995 state-by-state repeals of the RAP.[136] Since then, continued increase in the GST's

that the Rule against Perpetuities is being abolished with little if any reflection upon the merits of the Rule *on its own*, without regard to tax considerations.").

[131] Sitkoff & Schanzenbach, *supra* note 125, at 371 & n.45 (citing 26 U.S.C. §§ 2631(c), 2010(c)).

[132] *Id.* at 371 (describing monetary repercussions of GST); *Estate Tax*, *supra* note 4.

[133] *See* Sitkoff & Schanzenbach, *supra* note 125, at 371 ("The federal tax code puts no limit on the duration of the transfer tax exemption. Instead, Congress left it to state perpetuities law to limit the duration of a transfer-tax-exempt trust.").

[134] Osnos, *supra* note 14.

[135] Horowitz & Sitkoff, *supra* note 6, at 1784 (describing Delaware's repeal of RAP in 1995).

[136] *See* Stewart E. Sterk, *Jurisdictional Competition To Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2097 (2003) ("The Rule Against Perpetuities ('the Rule') may be on its last legs. Over the last decade, legislatures across the nation have been abolishing, or substantially curtailing, the common law rule that, despite its renowned complexity, has endured for more than 300 years."); *see also* Bloom, *supra* note 75, at 569 (ascribing trend of repealing RAP to GST). In response, Alaska, Arizona, Illinois, Maine, Maryland, New Jersey, Ohio, and Rhode Island authorized perpetual trusts by the end of 2000. Schanzenbach & Sitkoff, *supra* note 121, at 2474-75. By the end of

exemption limit to a combined $26 million today has only increased the use of perpetual trusts in these states.[137]

In demonstrating the effects of the end of the RAP and the rise of the GST, the variation among trust-friendly states is vast and is compounded by more than just the benefits of a lack of a RAP in place. However, the lack of the rule, spurred on by the creation of the GST, is what makes these perpetual trusts possible.[138] In South Dakota, there is no RAP in force at all, with only a rule against restraint on alienation, which dictates that alienation of the real interest of trust assets may not be restrained for more than the lives in being plus thirty years.[139] Nevada does, in fact, have a rule in a modified wait-and-see form, with a 365-year limit based on lives in being, well beyond the traditional RAP or the modified wait-and-see form.[140] Similarly, Tennessee has a limit of slightly less at 360 years, well beyond what traditional law would deem a perpetuity.[141] Other states provide similarly unwieldy perpetual perpetual trust estates, up to 1,000 years,[142] while others have no rule at all.[143] A notable exception is Louisiana, which has never had a RAP, but its statutes terminate trusts usually within a narrower time limit than the uniform statutory RAP would.[144] The synthesis of these varied statutes reveals a landscape shaped by the GST and interstate competition that has led to the RAP now being a minority position, with allowances for centuries-long or even fully perpetual trusts as the norm in a majority of states.

B. *The Benefits and Detriments of Perpetual Trusts*

Having surveyed the entirety of the current state of perpetual trust law as it relates to the RAP and as spurred on by the GST, one may be left with the ever-vexing yet ever-critical question: Why should anyone care? The benefits and

2005, Colorado, Florida, Missouri, Nebraska, Nevada, New Hampshire, Utah, Virginia, and Wyoming had followed suit. *Id.*

[137] *See* Orgain, *supra* note 25, at 182 ("The 2001 Act set up a gradual repeal . . . . [, which] increased the exemption amount every year until 2010 when the tax was automatically repealed." (footnote omitted)); *Estate Tax*, *supra* note 4.

[138] The most trust-friendly states, according to professional rankings on the matter, are South Dakota, Nevada, Tennessee, Arkansas, and Wyoming. NFP CORP., 2020 DYNASTY TRUST STATE RANKINGS 1-2 (2020), https://webfiles2.nfp.com/webfiles/public/2020_emails/COVID-19/19-PCR-PF-GEN-0055-DynastyTrustStateRankings_NFP.pdf [https://perma.cc/5GZE-4F6S].

[139] S.D. CODIFIED LAWS §§ 43-5-1, -4, -8 (2023).

[140] NEV. REV. STAT. § 111.1031 (2021).

[141] TENN. CODE ANN. § 66-1-202 (2022).

[142] *See, e.g.*, ALASKA STAT. § 34.27.051 (2022); ARIZ. REV. STAT. ANN. § 14-2901 (2022); COLO. REV. STAT. § 15-11-1102.5(1) (2022); UTAH CODE ANN. § 75-2-1203 (LexisNexis 2022); WYO. STAT. ANN. § 34-1-139(b) (2022).

[143] *See, e.g.*, MO. REV. STAT. § 456.025(1) (2022); OHIO REV. CODE ANN. § 2131.08 (LexisNexis 2022); 34 R.I. GEN. LAWS § 34-11-38 (2022).

[144] LA. STAT. ANN. § 9:1831 (2022).

detriments of perpetual trusts, in short, are a matter of divided perspective, another step in the historical divide between control and flexibility. We begin with the benefits reaped by the drafters, settlors, beneficiaries, and trustees of perpetual trusts before turning to the policy concerns perpetual trusts pose.

1. Trust Benefits

From the perspective of those states that have welcomed the perpetual trust industry, and those who create them, the removal of the RAP and the advent of the GST was a timely boon. Those within the trust business in trust-friendly states have welcomed the use of perpetual trusts.[145] Trust companies in South Dakota praise the relaxed laws as a beneficial estate planning tool for those in any state. There, a single company works with "[t]rust accounts representing more than $135 billion in assets under administration" and "over 115 billionaire and 360 centimillionaire clients."[146] In practice guides, the use of perpetual trusts for clients in non-trust-friendly states is equally suggested and encouraged where the trust laws are very welcoming to trusts.[147] The result is billions of dollars protected and preserved for future generations, free from division by taxation or by those that the settlor does not deem worthy of their wealth.

The settlor's perspective is the same dynastic impulse that has motivated settlors in centuries past to ensure that accumulated wealth would persist in providing income for future descendants for as long as possible, while preventing those future generations from wasting or losing that wealth to creditors. Settlors are also motivated by promises that the federal government would never be able to tax these perpetual trusts upwards of the $24 million exemption amount (as of 2022, for a married couple).[148] The result is billions of dollars protected and preserved for future generations, free from division by taxation or by those that the settlor does not deem worthy of their wealth. Beneficiaries who are or may become unable to earn their own incomes (perhaps due to physical or mental illness), or who are irresponsible with money, are greatly benefitted by being trust fund beneficiaries. Yet there may be beneficiaries who would prefer termination of perpetual trusts, with distribution of the remaining corpus to them for them to determine whether and how to benefit future generations of their own descendants, or their own choice of charities, spouses, causes to benefit with this inherited wealth—not unlike the common recovery's ability to convert fees tail into fees simple.

[145] *See* Debbie Cenziper, Will Fitzgibbon & Salwan Georges, *Foreign Money Secretly Floods U.S. Tax Havens. Some of It Is Tainted.*, WASH. POST (Oct. 4, 2021), https://www.washingtonpost.com/business/interactive/2021/booming-us-tax-haven-industry/?itid=lk_inline_manual_2; Mider, *supra* note 3.

[146] *Unique South Dakota Laws*, S.D. TR. CO. LLC, https://www.sdtrustco.com/why-south-dakota/unique-south-dakota-laws/ [https://perma.cc/FF2U-YWQJ] (last visited Feb. 10, 2023).

[147] *See, e.g.*, STEPHEN J. PAGANO, CHARACTERISTICS AND USES OF TRUSTS (NJ), LexisNexis (database updated Dec. 2022); Steverman et al., *supra* note 1.

[148] *See supra* Section II.A.

Lastly, the trustee, often a corporate trustee, has every incentive to market perpetual trusts. Corporate trustees have the power to choose a governing state law (based on where they do business) that has repealed the RAP for private trusts, to draft an express trust provision making it a material purpose of the trust that they or their corporate successor remain the trustee, to draft provisions also insulating them from liability to beneficiaries insofar as possible, to require the arbitration of disputes, to permit informal accounting only to adult beneficiaries, to distribute principal with discretionary powers to different trust provisions under an even more favorable state law, and to act on the many other powers that the Uniform Trust Code currently allows within a trustee's.[149] With all this discretion, a corporate trustee can earn about $200,000 annually *per trust* in compensation for a trust that contains the maximum $24 million.[150] But what their articles and practice guides do not outline[151]—nor any trust practices extolling the virtues of perpetual trusts—is the potential for downstream issues that are inevitable when a perpetual trust is created with no foreseeable sunset on its temporal control. Others, however, have not been so quick to overlook this policy concern.

2. Policy Detriments

As a matter of policy, the removal of the RAP has been met with a host of criticisms from some of the most esteemed names in trust law. Some have argued that the removal of the RAP could be a violation of some states' constitutions that expressly disallow perpetuities.[152] Others raise concerns of growing wealth inequality as wealth accumulations become forever tied to the descendants of a single family line, reminiscent of the long-gone aristocratic classes once upheld by the use of the fee tail, as Jesse Dukeminier and James Krier have noted.[153] To be sure, the RAP never prevented great fortunes in American history, from the Royalls to the Rockefellers, but their control over the wealth of their descendants is long gone. For a perpetual trust created today, the same may not be said decades, or even centuries, from now.[154] Moreover, there is reason to speculate

[149] *See* RESTATEMENT (THIRD) OF TRS. § 86 note on cmts. a & b (AM. L. INST. 2007) (noting courts will not interfere with powers and discretion of trustees so long as trustees' acts are in reasonable good faith). Such power is not boundless, however. As Judge B. Learned Hand once noted, "[N]o language, however strong, will entirely remove any power held in trust from the reach of a court of equity." Stix v. Comm'r, 152 F.2d 562, 563 (2d Cir. 1945); *see also* SITKOFF & DUKEMINIER, *supra* note 20, at 618-20 (describing discretionary powers of trustees and their limitations).

[150] *See* SITKOFF & DUKEMINIER, *supra* note 20, at 658 n.117; *see also* UNIF. TR. CODE § 708 (UNIF. L. COMM'N 2003) (permitting trustees to accept all reasonable compensation).

[151] *See, e.g.*, PAGANO, *supra* note 147.

[152] *See* Horowitz & Sitkoff, *supra* note 6, at 1787.

[153] Dukeminier & Krier, *supra* note 115, at 1320.

[154] Note, *Dynasty Trusts and the Rule Against Perpetuities*, 116 HARV. L. REV. 2588, 2588, 2607 n.84 (2003) ("Although titles of nobility are for the most part a historical footnote in the American consciousness, and we seem to care more about founding successful corporations

(although such speculation would require empirical study in its own right) that the existence of perpetual trusts may disincentivize the creation of charitable trusts, which have always been exempt from the RAP.[155] Why would today's Royalls and Rockefellers choose to leave charitable trust funds to found their own law school or foundation?[156] Instead, settlors may now reap the benefits once reserved only for charitable trusts for their own gain. Practically speaking, this policy concern about extremely long lasting or potentially perpetual control over wealth, the same problem that plagued the fee tail and other perpetuities and led to the rise of common recovery, strict settlement, and the RAP, is an impending concern for trust law. The impracticality of a trust lasting forever means that there must reach a point where the mortmain control and the realities of descendants no longer align. Perpetual trusts assume an infinite scope to a finite world. With each generation, the number of beneficiaries could grow exponentially, creating administrative problems for the use of the trusts and the duties of their trustees.[157] The investment and distribution functions of the

than founding great dynasties, none of this is to say that bloodlines and descent are of no consequence in American society."). Today, "estimates [are] that there is $800bn of offshore wealth in the US . . . . [and that offshore wealth in the United States is growing] faster than any rival except Hong Kong and Singapore." Kara Scannell & Vanessa Houlder, *US Tax Havens: The New Switzerland*, FIN. TIMES (May 8, 2016), https://www.ft.com/content/cc46c644-12dd-11e6-839f-2922947098f0 [https://perma.cc/458Y-3Y4J] (discussing emergence of trust companies in South Dakota in context of international offshore tax haven schemes); *see also* Arif Ali, Andrew Boutros, David Kelley, Andrew Levander, Kaitlyn Walsh & Jeremy Zucker, *The Pandora Papers and the Heightened Importance of "Knowing Your Customer*,*"* JD SUPRA (Oct. 11, 2021), https://www.jdsupra.com/legalnews/the-pandora-papers-and-the-heightened-8110656/ [https://perma.cc/RL9V-4D8F]; Brent Beardsley, Jorge Becerra, Bruce Holley, Daniel Kessler, Federico Muxí, Matthias Naumann, Tjun Tang, André Xavier, Anna Zakrzewski & Jürgen Rogg, *Global Wealth 2015: Winning the Growth Game*, BOS. CONSULTING GRP. (June 15, 2015), https://www.bcg.com/publications/2015/financial-institutions-asset-wealth-management-global-wealth-2015-winning-the-growth-game [https://perma.cc/ZS4P-H38U] (reviewing growth trends in global wealth markets in 2014 from offshore perspective); Kaplan, *supra* note 1 (describing heir's reaction to Panama Papers and role of South Dakota as offshore tax haven); Casey Michel, *The United States of Dirty Money*, ATLANTIC (Oct. 5, 2021), https://www.theatlantic.com/ideas/archive/2021/10/how-south-dakota-became-haven-dirty-money/620298/ (opining on ramifications of South Dakota's tax haven status after Panama Papers leak).

[155] *See* Frederick Vierling, *The Rule Against Perpetuities Applied to Trusts.*, 9 ST. LOUIS L. REV. 286, 286 (1924).

[156] Isaac Royall used funds from his slave plantations in the Carribean to endow Harvard Law School and its "Royall Chair," while John D. Rockefeller funded the Rockefeller Foundation in perpetuity. *See* HLS News Staff, *Reckoning with a Painful Legacy: Harvard Issues Report on the University's Connections to Slavery*, HARV. L. BULL. (July 14, 2022), https://hls.harvard.edu/today/reckoning-with-a-painful-legacy/ [https://perma.cc/44B6-M6VU]; *Our History*, ROCKEFELLER FOUND., https://www.rockefellerfoundation.org/about-us/our-history/ [https://perma.cc/NJC2-YUAR] (last visited Feb. 10, 2023).

[157] Lawrence W. Waggoner, *From Here to Eternity: The Folly of Perpetual Trusts* 5-9 (Univ. of Mich. L. Sch. L. & Econ. Working Papers, Paper No. 76, 2014).

trustee, which are core to every trust, will be hindered by the division of the trust over time, as the fiduciary relationship governing the trust may become increasingly difficult to control within the many strict duties and harsh penalties imposed on trustees.[158] For example, a trust created in 1662 by Massachusetts colonist Samuel Hinckley could have over 100,000 beneficiaries today, including President George W. Bush and President Barack Obama, making it almost inevitable that state-level trust law will have to step in beforehand to mitigate such an unwieldy legal instrument.[159] Trusts will provide for conditions, limitations, or other terms that will inevitably make less sense generations later and will require judicial intervention.[160] It is true that the Uniform Trust Code, as adopted in many states, permits a trustee to divide a trust if the number of beneficiaries has grown too large or to combine trusts if the corpus has grown too small.[161] However, many of the states that most commonly permit perpetual trusts, such as South Dakota and Nevada, do not make these provisions mandatory for all trusts.[162] Eventually, the problem of perpetual trusts will create mortmain control generations beyond its creation, and state courts will have to decide what to about a trust whose control remains but whose effects no longer align with the current world.[163]

Beyond the mere practicality of it, some have even speculated at the greater social impacts of this "golden age of . . . tax avoidance" and claim that the problem of perpetual trusts has "contributed to the turbulence in American

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[158] Lawrence W. Waggoner, *Message to Congress: Halt the Tax Exemption for Perpetual Trusts*, 109 MICH. L. REV. FIRST IMPRESSIONS 23, 25 (2010) ("Four hundred fifty years after a . . . perpetual trust is created, the number of living beneficiaries of that one trust could rise to 1.8 million . . . ."); *cf.* William J. Turnier & Jeffrey L. Harrison, *A Malthusian Analysis of the So-Called Dynasty Trust*, 28 VA. TAX. REV. 779, 795-96 n.44 (2009) (discussing unusual strategy, normally barred by fiduciary duty, for trustee to invest in speculative realty producing no periodic income to realize capital gains and tax advantage).

[159] *Compare* Waggoner, *supra* note 157, at 7, *with* Bridget J. Crawford, Commentary, *Who Is Afraid of Perpetual Trusts?*, 111 MICH. L. REV. FIRST IMPRESSIONS 79, 86-87 (2012).

[160] *See* Susan F. French, *Perpetual Trusts, Conservation Servitudes, and the Problem of the Future*, 27 CARDOZO L. REV. 2523, 2530 (2006) ("Allowing deviation from administrative and investment provisions of trusts has long been accepted, reformation and modification to obtain tax advantages is allowed in several states, and there has been some movement toward allowing courts to authorize deviation from the dispositive provisions of trusts as well.").

[161] *See* UNIF. TR. CODE § 417 (UNIF. L. COMM'N 2003).

[162] *See* NEV. REV. STAT. § 163.025 (2021 ("*Except as otherwise provided by the terms of the trust instrument*, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts . . . ." (emphasis added)); S.D. CODIFIED LAWS § 55-3-29 (2023) ("[*E*]*xcept as otherwise provided by the terms of the trust*, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts . . . ." (emphasis added)).

[163] *See* Scott Andrew Shepard, *Which the Deader Hand? A Counter to the American Law Institute's Proposed Revival of Dying Perpetuities Rules*, 86 TUL. L. REV. 559, 607 (2012); Tate, *supra* note 27, at 623 ("It is true that each generation of beneficiaries has better information than the settlor about the needs and propensities of that generation and those that immediately follow.").

politics," "harden[ed] social stratification," and "reduc[ed] public resources for education, health, and infrastructure" all the while "eroding trust in America's mythologies of fairness and opportunity."[164] That, in short, is a growing issue.

III. PERPETUAL TRUSTS AND A HISTORICAL LENS TO SOLUTIONS

Having recognized the problems inherent with the current system of perpetual trust law, it is worth noting that attempting to stop the rise of perpetual trusts altogether would be an effort in futility. One solution to stop perpetual trusts would require states to choose to leave the trust market and end their abolition of the RAP, which would not only be against their own interest but would also only end if all states were to work in tandem. Even if this solution were to come to fruition, the many perpetual trusts that already exist would likely be grandfathered into any changes in the law governing them. This state-level race to abolish perpetual trusts could end with congressional action to remove or reform the GST or otherwise override state perpetuities statutes, although the state of trust law is hardly a hot button issue at the federal level nor is reliance on congressional action alone a sufficiently fleshed-out solution to the issue. This Note's solution relies on neither of these. Thus this Note's solution is a lifeboat, not a blueprint. It does not look to stop perpetual trusts—a generation of the most esteemed professors of trust law have tried and failed to argue for their end. Instead, assuming the continuation of perpetual trusts, the solution posed by this Note looks to provide means of modifying, in a broad sense of the term, perpetual trusts to ensure that their potentially infinite life is a benefit, not an encumbrance, to the future generations that will benefit from them.

Adopting and adapting solutions to the law of perpetual trusts is the next step in the chain of judicial solutions, extending from the fee tail and the common recovery through the executory interest and the RAP. One may ask, at this point, why perpetual trusts? Why must there be a solution to perpetual trusts that would not apply to all trusts, as there is little distinguishing a perpetual trust from any other trust within the perpetuity period? The answer lies, unsurprisingly, in the history of perpetuities. With the modern RAP's disappearance, the rule that had heretofore stopped infinite duration of perpetual grants is waning. Thus, we must look to what came before it—the earlier, more flexible "reasonable time" version of the RAP for perpetuities and the common recovery and strict settlement for fees tail—and should look to what came after it—rules allowing the modification of trusts even within the perpetuities period. Using the former as a lens through which to view the latter, this solution will, after dismissing less viable federal-level solutions, argue for a statutory change based on the earlier form of the RAP and a common law reinterpretation of existing statutes based on common recovery and strict settlement. As Coke noted four centuries ago,

[164] Osnos, *supra* note 14.

the law "delights in [the] vesting of estates;"[165] through this historical lens, the law may again "delight" in the assurance that perpetual does not mean forever.

A. *Dismissing Alternatives: Federal Solutions, Constitutional and Statutory*

The first set of potential solutions, and the most unlikely to solve the heart of this problem, would be a federal solution based on either a very attenuated constitutional argument overruling state statutes or a full-scale congressional statutory change to the GST and other incentives that could spur states on to confront their existing laws on perpetual trusts. The difficulties inherent in these potential federal solutions demonstrate the necessity for solutions at the state level, based on state-level statutory change or judicial reinterpretations.

1. Federal Constitutional Solution

One line of argument against perpetual trusts has, rightly, analogized them to fees tail but then analogized fees tail to the Constitution's ban on titles of nobility.[166] Arguing for the unconstitutionality of perpetual trusts under the Titles of Nobility Clause, however, is attenuated at best. As a matter of precedent, the Supreme Court in *United States v. Perkins*[167] denounced any federal rights to particular dispositions of property at death, which "has always been considered purely a creature of statute, and within legislative control," not a constitutional concern.[168] Otherwise, the Titles of Nobility Clause has rarely been litigated.[169] That the Clause says "by the United States" equally counters

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[165] Roberts v. Roberts (1613) 80 Eng. Rep. 1002, 1009; 2 Bulstrode 124, 132 (KB); *see* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 25.5 note on present status of the destructability rule (AM. L. INST. 2011); UNIF. PROB. CODE § 2-207 (AM. L. INST. 2019) (making all remainder interests under trust contingent on survival to time of distribution, reversing Coke's presumption).

[166] *See* U.S. CONST. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States: And no 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."); Joel C. Dobris, *Undoing Repeal of the Rule Against Perpetuities: Federal and State Tools for Breaking Dynasty Trusts*, 27 CARDOZO L. REV. 2537, 2542 n.21 (2006).

[167] 163 U.S. 625 (1896).

[168] *Id.* at 627-29. *See generally* Irving Tr. Co. v. Day, 314 U.S. 556 (1942) (implying it would not be unconstitutional for state either to permit perpetual estates or to forbid them prospectively). There may be a Takings Clause claim, though no case points to a specific argument to be made on that matter. *Cf.* First Eng. Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318 (1987) (including mere temporary takings as constitutional takings).

[169] *See, e.g.*, *In re* Jama, 272 N.Y.S.2d 677, 677-78 (Civ. Ct. 1966) (rejecting Jama's petition to change his name to "Von Jama" because permitting Jama to add "Von" to his surname, a particle used to indicate a connection to German nobility, would be "contrary to the spirit and intent" of the Constitution as a grant of a title of nobility); JAY WEXLER, THE ODD CLAUSES: UNDERSTANDING THE CONSTITUTION THROUGH TEN OF ITS MOST CURIOUS PROVISIONS 1-2, 163 (2011) (calling *In re Jama* "one of the strangest opinions" author had

this claim: a fee tail or its equivalent was not granted by the United States or indeed any government; it was granted by a private donor to some donee of their choosing and supported by private law.[170] Despite many of the framers' noted dislike of the nature of fees tail, no line of cases lends any weight to the proposition that the Titles of Nobility Clause was intended to abolish the fee tail, which many states like Virginia and New York had already abolished by 1787 via their own constitutions.[171] Therefore, even though a fee tail may be rightly compared to a perpetual trust, no reasonable understanding of the Titles of Nobility Clause indicates that this comparison is enough to void or even affect perpetual trusts today.[172] With intentions derived from an earlier provision in the Articles of Confederation on accepting titles of nobility, the framers knew what a title of nobility was;[173] from their knowledge of English land law, they knew what a fee tail was;[174] and thus they knew the difference.

2. Federal Statutory Solution

A second possibility would be for federal action to overtake the various state approaches to the rule and thus discourage the use of perpetual trusts. Because of the constitutional issues with trusts and estates, this would be unlikely at best.[175] While changes in political climate are always a possibility, relying on a sweeping federal change as a solution to the problem described is a limited

ever read); *see also, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 424 n.51 (2010); Zobel v. Williams, 457 U.S. 55, 69 n.3 (1982); McCarty v. McCarty, 453 U.S. 210, 222 n.14 (1981); Roe v. Wade, 410 U.S. 113, 157 (1973); Downes v. Bidwell, 182 U.S. 244, 276 (1901); Julliard v. Greenman, 110 U.S. 421, 446-47 (1884).

[170] One could argue that a public official receiving a fee tail from a foreign royal may have triggered this clause, but no such case ever came to pass.

[171] *See* Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 8 (1977); *see also* Horowitz & Sitkoff, *supra* note 6, at 1809 (describing framers' aversion to "dynastic concentration of wealth").

[172] *But see* Dobris, *supra* note 166, at 2542 n.21.

[173] *See, e.g.*, Richard Delgado, *Inequality "From the Top": Applying an Ancient Prohibition to an Emerging Problem of Distributive Justice*, 32 UCLA L. REV. 100, 111-12 (1984) ("[James] Madison saw the prohibition of nobility as perhaps the 'most decisive' proof of 'the republican complexion of this system.'" (quoting THE FEDERALIST NO. 39 (James Madison))). A similar provision to the Titles of Nobility Clause had been included in the Articles of Confederation. ARTICLES OF CONFEDERATION of 1781, art. IV ("[N]or shall any person holding any office of profit or trust under the united states, or any of them, accept any present, emolument, office or title of any kind whatever from any king, prince or foreign state . . . .").

[174] *See, e.g.*, Alexander Hamilton, *Hamilton's Practice Manual*, in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 37, 128-31 (Julius Goebel Jr. ed., 1964) (1782) (describing in detail legal requirements to create and break fees tail in land); *see also* Hart, *supra* note 27, at 178.

[175] *Offshore Havens and Hidden Riches of World Leaders and Billionaires Exposed in Unprecedented Leak*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Oct. 3, 2021), https://www.icij.org/investigations/pandora-papers/global-investigation-tax-havens-offshore/ [https://perma.cc/5JJD-TLEP].

solution at best. To be sure, Congress could rely on the Commerce Clause to pass more encompassing legislation to allow the modification of state trust law where it affects the interstate flow of wealth.[176] However, any such defense of a law under commerce or tax powers would square against the longstanding federal precedent that issues of wills, trusts, and estates are not a constitutional concern, and thus political decisions regarding these topics are a state-level issue.[177] Similarly, the Supreme Court has maintained a "probate exception . . . to otherwise proper federal jurisdiction,"[178] which means that, while federal courts may interfere in issues surrounding probate, the actual laws of probate for wills, trusts, and estate are left to state courts.[179]

Beyond the Commerce Clause, Congress does possess plenary powers to tax, and the dynasty or perpetual trust has far more to do with the federal estate tax exemption than it has to do with any state statutory arrangement.[180] The linchpin of perpetual trusts is that the Internal Revenue Code permits the federal exemption amount to persist for so long as state perpetuity law permits—Congress could, if they so desired, amend this at will.[181] In fact, the Department of the Treasury in 2017 proposed a ninety-year limit on the duration of the federal estate tax and GST.[182] These would not violate the convention that probate matters are for state law authorities because they are entirely Internal Revenue Code matters.[183] But even if Congress did move forward with any federal, constitutional, or statutory challenge, any such measure would likely be

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[176] Dobris, *supra* note 166, at 2543 & n.24 ("[M]ost trusts, given investment patterns and beneficiary dispersion, are involved with interstate commerce."); *see* U.S. CONST. art. I, § 8, cl. 1, 3 ("The Congress shall have the power To . . . collect taxes . . . [and] To regulate Commerce . . . among the several States . . . ."). *See generally* Wickard v. Filburn, 317 U.S. 111 (1942) (expanding Congress's commerce powers by holding that farmer growing wheat for personal consumption fell within interstate commerce); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (vastly expanding Congress's commerce powers by affirming federal regulation that interfered with labor laws for industries wholly within given state).

[177] *See* United States v. Perkins, 163 U.S. 625, 629 (1896) (holding that ability to create wills or trusts is not federally protected right); *see also* Scott v. McNeal, 154 U.S. 34, 47-49 (1894) (same).

[178] Marshall v. Marshall, 547 U.S. 293, 296 (2006).

[179] *See id.*; LEWIS M. SIMES & PAUL E. BASYE, PROBLEMS IN PROBATE LAW 732-41 (1946); Dobris, *supra* note 166, at 2543 n.24 (conceding that author "do[es], however, acknowledge the idea that *probate* [law] is inherently local").

[180] U.S. CONST. art. I, § 8, cl. 8 ("Congress shall have Power To lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States; but all . . . shall be uniform throughout the United States . . . ."); U.S. CONST. amend. XVI ("Congress shall have power to lay and collect taxes on incomes . . . without apportionment among the several States, and without regard to any census or enumeration."); *see, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 564 (2012) (broadly defining Congress's power to tax).

[181] *See supra* Section I.A.

[182] *See* DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2017 REVENUE PROPOSALS 183-84 (2016).

[183] *See Scott*, 154 U.S. at 47-49.

an over-inclusive solution. Such a statute would cause sweeping disruption to the current field of perpetual trusts, limiting or eliminating them altogether, rather than solving the problems internal to them. Thus, a statutory method of change at the federal level appears unviable. As for the current state of policy for federal-oriented solutions (which would obviously require the Herculean task of prompting Congress to do something), there has been some attention given to the issue of perpetual trusts in recent years,[184] but little action has been taken thus far in changing tax loopholes.[185] It remains to be seen whether any changing political tide may lead to a federal solution,[186] but current prospects appear unlikely.[187]

B. *State Statutory Change: Returning to a Reasonable Rule Against Perpetuities*

Turning from federal policy to state policy, some such as Robert Sitkoff have already noted the potential state-level unconstitutionality of perpetual trust statutes.[188] As for a state statutory solution, one potential novel way to further this is a statute that provides greater ambiguity in how courts define the meaning of "perpetual," flexibility that would track to the original understanding of the RAP and its beginning in the seventeenth century. This flexibility could prove

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[184] *See* Osnos, *supra* note 14 ("Critics of global inequality . . . have pushed Congress to impose taxes, eliminate loopholes, and restore narrower limits on American inheritance."). Senator Susan Collins of Maine has presented "multiple suggestions for reform, including federal legislation that can override states when they toss rules against perpetuities, as South Dakota did." Kaplan, *supra* note 1. Her suggestions include requiring trusts to be registered and their owners be disclosed, and a one percent tax on trust assets and their interest. *Id.*

[185] Daren Firestone & Kevin Crenny, *Pandora Papers Reveal Need for Greater Tax Enforcement*, LAW360 (Oct. 14, 2021, 5:40 PM), https://www.law360.com/articles/1430851/pandora-papers-reveal-need-for-greater-tax-enforcement ("Tax enforcement shouldn't be a partisan issue. When transparency forces tax cheats into the shadows, the IRS should have the resources to pursue them. They won't catch everyone, but the combined effort of sunlight and enforcement will support a healthier and more just tax system.").

[186] Some attention to this issue, spurred by the release of the Pandora Papers, has reached the federal level. *See* 168 CONG. REC. S940 (daily ed. Mar. 22, 2022) (statement of Sen. Sheldon Whitehouse) ("The Pandora Papers last year revealed webs of American shell corporations and trusts hiding dirty assets. It revealed professionals—lawyers, accounts, and real estate agents—aiding and abetting the hiding of those dirty assets."); Complaint at 5 n.2, Sonn v. Getty, No. 1:22-cv-2758 (E.D.N.Y. May 11, 2022) ("Nevada and Texas are the only United States jurisdictions that do not have an information sharing agreement with the IRS. In addition, Nevada's statutory framework surrounding financial disclosures was expressly designed to generate revenues by offering financial secrecy protections that rival offshore tax havens such as the Cayman Islands and Panama.").

[187] Ali et al., *supra* note 154 ("Time will tell whether the exposure of the Pandora Papers might impact pending or future legislation . . . .").

[188] Horowitz & Sitkoff, *supra* note 6, at 1772 ("Yet little-noticed provisions in the constitutions of nine states, including in five that purport to allow perpetual (or effectively perpetual) trusts, proscribe 'perpetuities.'"). No state supreme court, it may be noted, appears to have yet struck down any statute permitting perpetual trusts as unconstitutional.

to be a positive boon for states that were to adopt it, combatting the incentive issue. Thus, it is here, in proposing a model statute, that one finds a more viable solution, where state law stands as the proper realm to ensure this balance and flexibility.

1. Perpetual Trusts as Perpetuities

To make this proposed solution viable, the perpetuity of English common law must first be, in fact, sufficiently analogous to the perpetual trust. It may be easily raised and dismissed that a perpetual trust is, by any definition of historical candor, a perpetuity.[189] Their duration extends far beyond the reach, in theory, of any grant that would otherwise be limited where the RAP still resides. Because the RAP applies to legal as well as equitable interests, the perpetual trust sits squarely within the definition of a perpetuity.

2. Reasonable Modification of Perpetual Trusts

Having compared the perpetual trust to the perpetuity, a potential way to address the problem of perpetual trusts as outlined is to look to the RAP before its petrification into twenty-one years, lives in being, and wait-and-see timeframes. Turning to this older form of the RAP, states that allow perpetual trusts to modify their statute could take on a similar broad application. Such a statute would be modeled on the following:

> No interest, legal or equitable, is good unless it is determined to exist for a reasonable time on the basis of facts existing at the termination of one or more life estates or lives. Any interest that is deemed not to conform with the preceding requirements shall be reformed or modified, or, in the event that modification is not possible, terminated.

This application would permit that a perpetual trust "may be terminated." Unlike the harshly rigid common law RAP or the bright line of a fixed time for a wait-and-see rule,[190] such a statute would adeptly incorporate a broader and more flexible approach to the problem of perpetual control. The wait-and-see method attempts to resolve the complexities of the rule by making it harsher, but this application does just the opposite by providing a more adaptable approach to the rule.[191]

One could argue that this more flexible approach, which does rely on court discretion, means that the problems of the rule being too amorphous will compound. However, this rule could, in theory, be crafted so as to apply only to trusts, while the original more bright line wait-and-see rule would still apply to

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[189] *Cf.* Stanley v. Leigh (1732) 24 Eng. Rep. 917, 917-18; 2 P. Wms. 686, 688 (Ch) (defining perpetuity as "the limiting [of] an estate . . . in such manner as would render it unalienable longer than for a life or lives in being at the same time, and some short or reasonable time after").

[190] *See supra* Part I.

[191] *See supra* Part II.

interests in land. For example, such a rule could be crafted in line with the following:

> No interest held in trust is good unless it is determined to exist for a reasonable time on the basis of facts existing at the termination of one or more life estates or lives. Any interest that is deemed not to conform with the preceding requirements shall be reformed or modified, or, in the event that modification is not possible, shall be terminated.

Trusts have long been a facet of equity and equitable standards, as distinguished from common law rules.[192] Equitable standards, as contrasted with common law rules, have always taken on a more flexible approach.[193] Yet modern forms of the RAP are scarcely different from many common law rules of early modern England, which were so unwavering in their application that "[t]he possibilities of technical failure were legion [and] . . . . could also work injustice, because the judges held that it was preferable to suffer hardship in individual cases than to make exceptions to clear rules."[194] As noted by English jurist Sir William Blackstone, "[e]quity," as opposed to the more inflexible common law, "depend[s] . . . upon the particular circumstances of each individual case" and therefore "there can be no established rules."[195] Once again, this proposed alteration of the RAP is not some aberration from its core purpose but instead a revitalized understanding of the more flexible origins of the RAP's earlier iterations.[196]

One may also argue that having such an amorphous RAP is contrary to the goals of efficient administration and litigation avoidance that has led to an abundance of bright-line rules in the law of trusts.[197] But recall that this form of a RAP is a return to, not a deviation from, its original implementation, which

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[192] *See* Seipp, *supra* note 57, at 1011 ("English common law in its formative centuries was unacquainted with trust . . . .").

[193] *See* BAKER, *supra* note 25, at 105-26, 214-16 (describing evolution of equity and Court of Chancery). Much of the case law that formulated the modern RAP derived from cases decided by the Court of Chancery, including the *Duke of Norfolk's Case*. *See supra* Part I.

[194] *See* BAKER, *supra* note 25, at 110.

[195] 1 BLACKSTONE, *supra* note 82, at 61-62.

[196] *See supra* Section I.A.

[197] As a whole, Anglo-American common law is hardly a stranger to rules related to "reasonable time," "reasonable persons," etc. *See generally, e.g.*, RESTATEMENT (SECOND) OF TORTS (AM. L. INST. 1997); W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984). What is more, there is a standard terminology in legal scholarship that contrasts flexible standards with bright line rules. The common law RAP was a classic example of the all-or-nothing rule; in contrast, this proposed standard would depend on circumstances or a spectrum of considerations. The RAP applied to legal interests as well as equitable interests. But the focus of this Note is entirely on trusts and equitable interests. And standards with a more wavering sliding-scale discretion have always been more compatible with equitable interests than bright line common law-type rules. *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 586 (1992) (parsing differences between rules and standards).

once used a reasonable standard in place of the rigid twenty-one-year rule.[198] We no longer adhere to twenty-one as an all-encompassing age of majority, yet traditional versions of the RAP that still exist adhere to it.[199] The trend of trust law, moreover, has been an expansion, not a limitation, of more flexible and forgiving rules.[200] This form of the rule is in keeping with the trend of trust law in broadening once rigid rules.

This new RAP would require a statutory change that would only come from state legislatures' willingness to change their state laws, a change which may be contrary to their own self-interest within the proven market for trust fund assets among the states. Given this market, however, this statutory solution could be a return to what the RAP once was: a rule for perpetuities that were kept within a reasonable limit of time.[201] If states used this flexibility as a boon to their own position among trust-friendly states, then this could provide the continued market for these trusts that states desire while also planning for the future of these trusts that will become inherently necessary. Take for example Wyoming, which permits perpetual trusts and other perpetuities for 1,000 years.[202] If instead Wyoming adopted a statute to the effect of the one proposed *supra*, they could have trusts that, in theory, last far longer than 1,000 years for as long as courts continue to find that the given trust need not be voided based on the facts. This version of the rule would also provide the flexibility needed to end a trust that had become unwieldy.[203] If modified to say that a trust "may be voided or modified based on the facts existing at the termination of one or more life estates or lives," then this form of the rule could grant states a flexible and powerful tool to remain in the market for perpetual trusts while also providing the foresight to prevent the inevitable problems that will occur with a trust that could last, in theory, forever. As a matter of comparative law, the world of English common law is no stranger to a change in the RAP such as this, as other nations that have been influenced by British law have taken on more flexible methods

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[198] *Compare* Duke of Norfolk's Case (1682) 22 Eng. Rep. 931, 955-56; 3 Chan. Cas. 1, 40-42 (Ch) (allowing perpetuities to exist for reasonable time), *with* Stephens v. Stephens (1736) 25 Eng. Rep. 751, 751; Cases T. Talbot 229, 229 (Ch) (limiting life of perpetuities to twenty-one years of some life in being).

[199] 1 BLACKSTONE, *supra* note 82, at 162, 173, 368, 436, 440, 462, 463.

[200] This addition of flexibility to estate law is especially evident in the Uniform Trust Code. *See, e.g.*, UNIF. TR. CODE § 105(b) (UNIF. L. COMM'N 2003) (providing express limitations on trust terms that would modify default rules); *Id.* § 1008(b) (invaliding any trust term that would exculpate trustees for abuse of fiduciary duties).

[201] *See Duke of Norfolk's Case*, 22 Eng. Rep. at 931; 3 Chan. Cas. at 956.

[202] WYO. STAT. ANN. § 34-1-139(b) (2022).

[203] *See* Dobris, *supra* note 166, at 2544 & n.32; *see also* Ronald Chester, *Modification and Termination of Trusts in the 21st Century: The Uniform Trust Code Leads a Quiet Revolution*, 35 REAL PROP. PROB. & TR. J. 697, 724 (2001) (arguing for use of same doctrines altering charitable trusts to alter perpetual private trusts).

to deal with their laws on perpetuities.[204] Following suit, states that are currently outside the perpetual trust market, such as Massachusetts or New York, could even enter the perpetual trust market with such a modification, reaping all the benefits of the market without concern of becoming a state that harbors trusts of infinite duration.

Lastly, this proposal requires a brief note on the importance of mandatory and default rules in trust statutes. Although the Uniform Trust Code's provisions on modification, and those states which have adopted them, provide needed flexibility,[205] states such as South Dakota and Nevada provide that the rules are merely default, not mandatory.[206] Based on this distinction, there is surely a certain caution to be taken when suggesting state legislatures change default rules. If a state trust code can be interpreted or misinterpreted as allowing any dollar of trust money to be paid to any taxing authority on any date, even far into the future, one can be sure that the drafter of the next perpetual trust after enactment of this change in the default rules will waive and opt out of this rule requiring, by express terms of the trust, that it not be modified. Therefore, unless state legislatures were to adopt changes to their rules of modification to make it mandatory, modification would be futile and every settlor could make a perpetual trust unmodifiable. It is therefore of the utmost importance that state legislative changes in trust law be kept mandatory and not watered down to mere default rules that can be and will be easily waived.

C. *State Judicial Interpretation: A Return to Equitable Standards*

The focus on the RAP as it relates to the rise of perpetual trusts invites the question of what if one were to look at perpetual trusts not as a perpetuity within the RAP's purview, but as little more than modern fees tail? What if the quest to end or limit perpetual trusts could be solved not by the RAP at all but instead by a modern form of judicial intervention, as was done by English courts five centuries ago when they countenanced common recoveries to tame the market-destroying effects of fees tail? Just as the common recovery and strict settlement

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[204] For example, "something close to [a more flexible] approach has been adopted in the Canadian Province of Manitoba, which in 1983 abolished the Rule against Perpetuities altogether and empowered courts to alter or terminate any trust when doing so would benefit beneficiaries." Dukeminier & Krier, *supra* note 115, at 1340; *see also* The Perpetuities and Accumulations Act, C.C.S.M. 1992, c P33 (Can.), https://web2.gov.mb.ca/laws/statutes/ccsm/p033e.php [https://perma.cc/565G-YZV9]. Likewise, in contrast to England and Wales, Scotland does not have a RAP, but other incentives, including taxation, encourage short-duration trusts. *See* Schanzenbach & Sitkoff, *supra* note 121, at 2483; *see also* Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, 14 Eliz. 2 c. 19 (UK), https://www.legislation.gov.uk/ukpga/1966/19/body [https://perma.cc/B2LD-BJ9U].

[205] *See* UNIF. TR. CODE § 105(b) (UNIF. L. COMM'N 2003) ("The terms of a trust prevail over any provision of this [Code] except . . . the power of the court to modify or terminate a trust under Sections 410 through 416 . . . ."); *see also id.* §§ 410-16 (outlining power to modify and terminate trusts).

[206] *See* NEV. REV. STAT. § 163.025 (2021); S.D. CODIFIED LAWS § 55-3-29 (2023).

of fees tail limited their perpetual duration and forced the entail to be rewritten at each generation, a modern form of such a scheme would connect to an understanding of a perpetuity as a fee tail and the solutions that limited the power of fees tail through common recovery and strict settlement schemes. It encompasses the use of trust modification combined with trust decanting and powers of appointment under existing statutes and common law rules. It proposes no changes to existing trust statutes but merely a lens through which to reinterpret them.

This solution contains three subparts. First, the power to change trusts, especially perpetual trusts, could allow greater modification. Second, there could be an expanded use of trust decanting. Third, there could be the increased use and acceptance of nongeneral powers of appointment. Thus, the state-level solutions track the reverse of the history of perpetuities and draw on centuries of inspiration. To isolate these common law-based solutions into a more digestible form, this Note will focus primarily on the laws of South Dakota, with comparisons to those of Nevada, Delaware, and Tennessee, the states that are collectively noted as among the best for perpetual trusts.[207] But this solution leaves room for analogous analysis and cross-applications to similar laws in any other state that permits perpetual trusts.

1. Perpetual Trusts as a Fee Tail

To explore this judicial interpretation alternative, it is necessary to return to an analysis of the fee tail as sufficiently analogous to the perpetual trust. The rationale for the historical limitations on fees tail, as noted, stemmed both from concerns over the alienability of land and the dynastic control that they granted.[208] With perpetual trusts, the exact competing interest that remains today is the latter: protection for the legal system, the families who are affected by these trusts, and society as a whole against unfettered and unreasonable control over descendants. Concerns have shifted because the problem of control is the one more prevalent for the perpetual trust, and alienability is largely no longer a concern where trust assets can be sold, leased, or mortgaged. Competition among the states has also created a market for perpetual trusts that was never found in the fee tail.[209] There is also a far greater concern over taxes in perpetual trusts than there ever was for fees tail, as only the medieval use and later trust

[207] NFP CORP., *supra* note 138, at 1-2. Among the most desirable perpetual trust states, Rhode Island is the only one that allows perpetual trusts in some form and also still have a tenancy in tail. *See supra* Part I. I include Delaware—which indeed has a highly active and growing trust market—at the suggestion and sound advice of Robert H. Sitkoff.

[208] Dukeminier & Krier, *supra* note 115, at 1319 ("Transferability (or 'alienability') of property promotes efficiency; it allows the movement of resources from lower to higher valued uses through voluntary transactions between buyers and sellers that leave both sides of the bargain better off. So it is unsurprising that free alienability is one of the enduring principles of English, and subsequently American, property law.").

[209] Many states had an opposite race to remove them during the 1980s. *See* Sterk, *supra* note 136, at 2101-05.

had an original purpose of preventing feudal incidents.[210] Thus, perpetual trusts are more an attempt to avoid taxes than to create a dynasty, but the results remain the same: wealth held for generations by mortmain control.

As for the law controlling them, a fee tail had to change with each generation via strict settlement, or it could be converted to a fee simple by a common recovery, which explains why fees tail did not need an application of the RAP to have their mortmain control removed: common recovery already acted as a common law backstop to perpetual control. Thus, the current state of mortmain control in a perpetual trust is no longer assuring the marketability of land and other specific assets but instead presents a more pressing issue than a fee tail did after the judicial creation of the common recovery because the perpetual trust cannot be rendered innocuous by any tricky lawsuit countenanced by courts. Instead, suits by beneficiaries to modify or terminate trusts would be the counterpart today to common recoveries barring fees tail.[211] While a nongeneral power of appointment can resemble the purposes of strict settlement by allowing the trust assets to vest in another party, as will be explored *infra*, not all perpetual trusts have such provisions.[212] Moreover, the effect of a perpetual trust without such an implementation is effectively a stronger form of strict settlement,[213] where the perpetuity may continue indefinitely but the grant need not be revised or updated by any such complex scheme.[214] In other words, calling the perpetual trust akin to a fee tail is an understatement of the power of perpetual trusts today as compared to the former power of fees tail. These similarities in nature and noted differences in their legal status will inform the foregoing common law solutions as an avenue for trust beneficiaries to modify perpetual trusts and thus regain some control over the wealth therein.

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[210] *Cf.* Schanzenbach & Sitkoff, *supra* note 121, at 2498 ("Finally, although the rise of the perpetual trust might appear to supply evidence of a dynastic impulse, our findings cast doubt on the validity of that inference. Instead, our findings underscore the importance of tax considerations in driving the structure of donative transfers by tax-sensitive wealth holders.").

[211] *See* Hart, *supra* note 27, at 177-78 (noting how Virginia Assembly's Act of 1776, which abolished fees tail, drastically changed private enforcement rights to redistribute wealth); Horowitz & Sitkoff, *supra* note 6, at 1808 ("By enabling a donor to create an inalienable string of beneficial life estates . . . the perpetual trust statutes have resurrected the entail in a new guise."); *see also* BIANCALANA, *supra* note 31, at 106-21 (describing origins and use of common recovery to end fees tail).

[212] *See* Les Raatz, *State Constitution Perpetuities Provisions: Derivation, Meaning, and Application*, 48 ARIZ. ST. L.J. 803, 824 (2016) ("[For perpetual trusts,] there is no impermissible perpetuity if one or more persons have a power to appoint trust property outright within the permissible period, whether or not the power is exercised.").

[213] *Id.* (explaining how vesting rights expand the durability of perpetual trusts); *see also* BAKER, *supra* note 25, at 293-94 (describing strict settlement).

[214] SITKOFF & DUKEMINIER, *supra* note 20, at 913-15. *See generally* John V. Orth, *Escaping the Malthusian Trap: Dynasty Trusts for Serious Dynasts*, 17 GREEN BAG 2D 29 (2013) (elaborating on trust provisions that protect dynastic trusts from asset-diluting circumstances, such as large pools of beneficiaries).

2. Modification and Termination of Perpetual Trusts

Having demonstrated the connections between modern perpetual trust and the once-dominant fee tail, it is fitting to begin with the most obvious form of altering the duration of trusts outside of the RAP's limitations: modification and termination laws, as they relate to South Dakota, Nevada, Delaware, and Tennessee. Courts have been receptive to a variety of reasons for modification, including allowing modification for tax benefits where a lack of modification would create an inefficiency.[215] Modification based on changed circumstances will eventually become essential to perpetual trusts. Their potentially infinite generations will necessitate their modification, division, or eventual termination. An analogous application of this doctrine could form the basis of a modern solution with roots in the idea of barring fees tail (and thus converting them to fees simple). Modification of administrative terms would be straightforward based on current law under the equitable deviation, or changed circumstances, doctrine. Modification based on dispositive terms will require an inquiry into intent but is still applicable.[216] Such modification will also be able to take advantage of a tax-efficient outlook, where the terms of a trust alone or the duties of the trustee alone may be wholly insufficient to support a system necessary to allow a modern form of common recovery.[217] However, the latter imposes the danger, of which courts and potential litigants must be equally aware, that a settlor can expressly state in the trust document that it is their intent and material purpose that this trust not be terminated in any way that will result in any beneficiary paying any tax to any authority. This would always be a contrary expression of settlor intent precluding modification, unless the court rightly weighs motives for modification against the settlor's expression of intent against modification.

South Dakota permits that "[a]n irrevocable trust may be modified or terminated by judicial action or by written agreement entered into by all beneficiaries, if continuance of the trust on its existing terms is not necessary to

[215] *See, e.g.*, O'Connell v. Houser, 18 N.E.3d 344, 347 (Mass. 2014). The Uniform Trust Code has affirmed such a modification, as has the Restatement of Property. *See* UNIF. TR. CODE § 105(b) (UNIF. L. COMM'N 2003); RESTATEMENT (THIRD) OF TRS. § 65 (AM. L. INST. 2003).

[216] *See* Adam Hofri-Winogradow, *The Demand for Fiduciary Services: Evidence from the Market in Private Donative Trusts*, 68 HASTINGS L.J. 931, 982 (2017) ("The two noted that a key advantage clients see in 'perpetual' trusts is that their actual duration is completely flexible given the ever-present option of terminating them, while the maximum possible duration of trusts subject to a perpetuity period is fixed.").

[217] *See* Shepard, *supra* note 163, at 607 (arguing that "[l]ong before reaching that point" where perpetual trust's administration becomes unsustainably unwieldy over time "trustee of such a trust would be under a fiduciary obligation to petition the court to terminate the trust to prevent such an outcome"). *But see, e.g.*, S.D. CODIFIED LAWS § 55-13A-103(b) (2023) (exculpating fiduciaries from duty of impartial treatment of trust beneficiaries).

carry out a material purpose,"[218] which effectively codifies the *Claflin* doctrine.[219] The 2021 amendment, in the first paragraph, substituted "terminated by judicial action or by written agreement entered into by all beneficiaries" for "terminated upon the consent of all of the beneficiaries" in the first sentence; "terminated by judicial action or by written agreement of all beneficiaries" for "terminated upon the consent of the trustor and all of the beneficiaries" in the second sentence; and "is required" for "may be required."[220] The few cases that have dealt squarely with interpreting this statute have affirmed that "all beneficiaries must consent to an amendment" under this doctrine.[221] This decision, however, was effectively broadened by the South Dakota legislature in 2021, where consent is no longer of much, if any, use to the problem of ending trusts because the judicial piece is removed, and consent is made only optional for the trust to be modified or terminated.[222] It is surprising, to be sure, that South Dakota would offer flexibility in modification—likely as a way only to further encourage perpetual trust—yet they have broadened modification rules so as to form a crack in the proverbial wall of dynasty trust dominance. South Dakota also provides an analogy to the equitable deviation doctrine, which permits that "the court may modify the administrative or dispositive terms of the trust or terminate the trust if, because of circumstances not anticipated by the trustor, modification or termination of the trust would substantially further the trustor's purposes in creating the trust."[223] Interpretations of this statute regarding

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[218] S.D. CODIFIED LAWS § 55-3-24; *see also* Mary Akkerman, *Decanting: A Practical Roadmap for Modernizing Trusts in South Dakota*, 61 S.D. L. REV. 413, 414 (2016) (noting South Dakota's "flexible and favorable" modification laws).

[219] *Compare* S.D. CODIFIED LAWS § 55-3-24, *with* Claflin v. Claflin, 20 N.E. 454, 455 (Mass. 1889).

[220] S.D. CODIFIED LAWS § 55-3-24 (Amendment Notes).

[221] *See, e.g.*, Conservatorship of Didier, 2010 SD 56, ¶ 11, 784 N.W.2d 486, 491 (noting that because trust was revocable, section 55-3-24 was inapplicable and beneficiary's consent was not necessary); *see also* RESTATEMENT (THIRD) OF TRS. § 74(1)(b) (AM. L. INST. 2007). While Uniform Trust Code section 417 would reach a different outcome, South Dakota's statutes on that matter do not follow the Uniform Trust Code. *Compare* S.D. CODIFIED LAWS § 55-3-24, *with* UNIF. TR. CODE § 417 (UNIF. L. COMM'N 2003).

[222] *Cf.* Akkerman, *supra* note 218, at 414 (noting process is simple for modifying trusts in South Dakota); Craig J. Krogstad & Matthew P. Bock, *Modern Trust Governance*, 61 S.D. L. REV. 370, 371 (2016).

[223] S.D. CODIFIED LAWS § 55-3-26; *In re* Admin. of the C.H. Young Revocable Living Tr. Agreement, 2008 SD 43, ¶¶ 10-11, 751 N.W.2d 715, 717 ("[The statutes] are codifications of the common law equitable power of courts to modify the terms of a trust instrument when necessary to serve the original intention of the trustor."); *see also* Al W. King, III & Pierce H. McDowell, III, *A Bellwether of Modern Trust Concepts: A Historical Review of South Dakota's Powerful Trust Laws*, 62 S.D. L. REV. 266, 294 n.160 (2017) ("Based on the authors' and their clients' experience, if all beneficiaries consent to . . . modification, the court process can take as little as two hours to two weeks in South Dakota.").

modification disputes by South Dakota courts have been only slightly more frequent than with the prior statute.[224]

Nevada law similarly provides that a court "may modify a restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful" provided that the restriction "impairs the management or investment of the fund or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund."[225] Combining the two forms, however, requires that this be "made in accordance with the donor's probable intention" but provides some flexibility in saying that it only need be done "[t]o the extent practicable."[226] It appears that no reported Nevada cases have interpreted the most recent form of this statute. Delaware, in turn, maintains a separate statute for modification by consent when the settlor is still alive, and requires a "nonjudicial settlement agreement" for modification that can occur even where the settlor is deceased.[227] In many respects, a nonjudicial settlement is a broad and flexible form of modification. It allows beneficiaries to "enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust. . . . to the extent it does not violate a material purpose of the trust" with the consent of all beneficiaries.[228]

Turning lastly to the laws of Tennessee, trust law there, like South Dakota, allows that "a noncharitable irrevocable trust may be terminated upon consent of all of the qualified beneficiaries" or "modified upon the unanimous agreement of the trustee and all qualified beneficiaries if such modification does not violate a material purpose of the trust."[229] Courts have affirmed a limited application of this statute.[230] Tennessee law next provides for modification under an equitable deviation doctrine form, where a "court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust."[231] Tennessee courts have permitted a broader view of applying this statute.[232]

[224] *See In re* Guardianship & Conservatorship of Novotny, 2017 SD 74, ¶¶ 22-26, 904 N.W.2d 346, 351-52; *cf.* First Nat'l Bank v. Warner Bros. Ent. Inc., No. CV 09-00674, 2009 U.S. Dist. LEXIS 139133, at *7 (C.D. Cal. Aug. 26, 2009); *In re* Admin. of the Wallbaum Revocable Living Tr. Agreement, 2012 SD 18, ¶ 17, 813 N.W.2d 111, 117.

[225] NEV. REV. STAT. § 164.673(2) (2021).

[226] *Id.*

[227] DEL. CODE ANN. tit. 12, §§ 3343, 3338(a)-(c) (2023).

[228] *Id.* § 3338(a)-(c).

[229] TENN. CODE ANN. § 35-15-411(b)-(c) (2022).

[230] Miller v. Maples, No. E2016-00511-COA-R3-CV, 2018 Tenn. App. LEXIS 697, at *34 (Nov. 30, 2018).

[231] TENN. CODE ANN. § 35-15-412(a).

[232] *In re* Estate of Culp, No. M2015-01421-COA-R3-CV, 2016 Tenn. App. LEXIS 326, at *13 (May 12, 2016).

There are, to be sure, noted costs to modification of trusts via judicial means.[233] But when the eventual costs of unwieldy administration for perpetual trusts become too great, the benefits of modification will undoubtedly outweigh the detriments of litigation. In such a litigation, beneficiaries can and must apply the foregoing rules—or their analogous brethren in other less-popular perpetual trust states—and argue for their application within the context of perpetual trust modification as an analogy to the common law's earlier use of common recovery and strict settlements to alleviate problems of the fee tail. Where no rule limits perpetuities, a more liberal reading of modification is essential to ensuring that mortmain control does not override the benefits to the living. Only through this historical lens can we appreciate the full potential of these judicial interpretations of doctrines, ensuring the continuation of beneficiaries' benefit—with tax-minded alternatives after modification—relieved of unnecessary and unwieldy limitations of a trust instrument long ago drafted that should no longer be a controlling force.

3. Decanting Perpetual Trusts

If tax considerations are so critical to perpetual trusts—far more critical than they were to the historical laws surrounding fees tail—how then can the modifications above affect both a modern form of strict settlement without sacrificing the obvious and massive tax advantages affected by perpetual trusts? The first part of this answer lies in trust decanting, the process by which trust assets are transferred to a new trust.[234] By using decanting, the trusts can be renovated in such a way that would end the perpetual control of the original grant while keeping its tax benefits,[235] an act that could be done without court interference or as part of the modification scheme by the court. Decanting allows trusts to be moved without the objection of beneficiaries because "[w]hile reformation is a relatively easy way to modify an irrevocable trust, it does provide an avenue for disgruntled beneficiaries to object to the requested

[233] Dukeminier & Krier, *supra* note 115, at 1331 ("Judicial modification or termination of a trust can be costly. A lawsuit is required; legal fees, perhaps including legal fees for guardians ad litem representing minor, disabled, and unascertained beneficiaries, must be paid.").

[234] *See* Akkerman, *supra* note 218, at 413 (listing reasons decanting may be desirable); *see also* Simmons, *supra* note 69, at 255 (describing function and potential uses for trust decanting under South Dakota law).

[235] *See* Simmons, *supra* note 69, at 263-64 ("The South Dakota decanting statutes effectively grant trustees of irrevocable trusts the discretion to make a distribution to a beneficiary to exercise that authority by appointing trust assets to a new trust . . . . There are a number of exceptions to a trustee's ability to exercise such a power, which are primarily concerned with preserving federal estate and gift tax objectives in the original trust . . . ."); *see also* Stewart E. Sterk, *Trust Decanting: A Critical Perspective*, 38 CARDOZO L. REV. 1993, 2029 n.153 (2017).

relief."[236] However, for decanting to be a viable path forward, a change in incentives for trustees will be essential.

South Dakota expressly allows decanting "[u]nless the terms of the governing instrument expressly provide otherwise," where the trustee "may exercise such discretion by appointing part or all of the income or principal subject to the discretion in favor of a trustee of a second trust . . . under a governing instrument separate from the governing instrument of the first trust."[237] There are a number of limitations on this power, however, in that the decanting "may only have as beneficiaries one or more of the beneficiaries of the first trust," among other limitations.[238] No reported cases have analyzed the limitations of this statute.[239]

Nevada likewise places a limitation that decanting is allowed "unless the terms of a testamentary instrument or irrevocable trust provide otherwise" but permits that "a trustee with discretion or authority to distribute trust income or principal to or for a beneficiary of the trust . . . may exercise such discretion or authority by appointing the property subject to such discretion or authority in favor of a second trust."[240] Nevada's statute further limits that the "second trust . . . may only have as beneficiaries one or more of the beneficiaries of the original trust," among other limitations.[241] Nevada courts have interpreted this statute, finding that decanting may permit effective modification, absent court involvement in most cases, of the trust where the trust instrument is otherwise silent on the matter.[242] In Delaware, "a trustee who has authority . . . to invade the principal or income or both of a trust . . . may instead exercise such authority . . . by appointing all or part of such principal or income or both . . . in

[236] Akkerman, *supra* note 218, at 417-18 ("Because it is authorized by statute, decanting does not require beneficiary consent or court approval."); Simmons, *supra* note 69, at 254 ("[Decanting] is, in some ways, a 'backdoor' way of approaching trust reformation.").

[237] S.D. CODIFIED LAWS § 55-2-15 (2023); Akkerman, *supra* note 218, at 413; Simmons, *supra* note 69, at 263 ("The South Dakota decanting statutes effectively grant trustees of irrevocable trusts the discretion to make a distribution to a beneficiary to exercise that authority by appointing trust assets to a new trust.").

[238] S.D. CODIFIED LAWS § 55-2-15; Akkerman, *supra* note 218, at 413; Simmons, *supra* note 69, at 263-65.

[239] For a recitation and comparison of various state approaches to decanting, see Ferri v. Powell-Ferri, 72 N.E.3d 541, 553-54, 554 n.12 (Mass. 2017); Ferri v. Powell-Ferri, No. MMXCV116006351S, 2013 Conn. Super. LEXIS 1938, at *23& n.6, *24-25 (Aug. 23, 2013).

[240] NEV. REV. STAT. § 163.556(1) (2021); *see also* Phung v. Doan (*In re* Fund for the Encouragement of Self Reliance), 440 P.3d 30, 30 (Nev. 2019).

[241] NEV. REV. STAT. § 163.556. This limitation has been amended for appointing to a second trust that modifies the investment function of the prior trust. This must, however, be done while considering the intentions of the settlor. *See* Assemb. B. 318, 81st Leg., Reg. Sess. (Nev. 2021); Montoya v. Ahern (*In re* W.N. Connell & Marjorie Connell Living Tr.), 426 P.3d 599, 602 (Nev. 2018) ("We construe trusts in a manner effecting the apparent intent of the settlor.").

[242] *Phung*, 440 P.3d at 31-32 ("Because the trust instrument does not provide that a trustee may unilaterally distribute trust property, unanimous action by the trustees would be required to exercise the decanting right under the statute.").

favor of a trustee of a second trust," which effectively permits decanting.[243] Uniquely, Delaware expressly states the assumption that decanting is permitted "[e]xcept as otherwise expressly prohibited in the governing instrument."[244] As with Nevada, however, decanting under Delaware law comes with the limitation that prevents using decanting to alter the trust terms in a way that is not "substantially identical" to the first trust.[245] Lastly, Tennessee's statute on the matter of decanting "authorizes a trustee who possesses a discretionary power to distribute principal outright to trust beneficiaries to exercise that power in further trust," noting that "[t]his power, which is commonly referred to as a 'decanting' power, is considered a limited power of appointment."[246] As with Nevada and South Dakota, the limitations on such decanting mean that "new beneficiaries cannot be added to the second trust," but "[t]he decanting power can be used to reduce the income interest of one or more beneficiaries except trusts for which federal or state estate or gift marital deductions were claimed, charitable remainder trusts, and grantor retained annuity trusts or unitrusts."[247] There have been no citing decisions since 2021 that directly apply the most recent amendments to this statute.

Although trustees have the power to decant, they are supposed to obey the settlor's terms of the trust and care for the benefit of the beneficiaries, including future beneficiaries. Thus we reach a problem of incentives. Corporate or professional trustees have no obvious reason to act in the public interest,[248] and it is in the trustee's self-interest for the trust to continue in perpetuity, or for as long as possible, because the stream of reasonable compensation to the trustee only continues so long as the trust does. Trustees may claim that the benefit of current and future beneficiaries is always to continue the successive income

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[243] DEL. CODE ANN. tit. 12, § 3528(a) (2023).

[244] *Id.* § 3528(f); *see* Simmons, *supra* note 69, at 272 ("Delaware—like South Dakota—provides that the decanting power does not apply to trust property presently subject to a withdrawal power and cannot reduce an income right for which a marital deduction was claimed.").

[245] *In re* Niki & Darren Irrevocable Tr., No. 2019-0302, 2021 Del. Ch. LEXIS 23, at *9 (Feb. 4, 2021) ("[Decanting power] is cabined, however, by [the requirement] . . . that 'the remaining trust assets shall thereafter be held for the benefit of the beneficiaries of the first trust *upon terms and conditions* concerning the nature and extent of each such beneficiary's interest *that are substantially identical to the first trust's terms and conditions* concerning such beneficial interests.'" (quoting DEL. CODE ANN. tit. 12, § 3528)).

[246] TENN. CODE ANN. § 35-15-816 (2022).

[247] *Id.*

[248] The profusion of the environmental, social, and governance ("ESG") movement in investing may suggest otherwise, however. *See ESG Investing and Analysis*, CFA INST., https://www.cfainstitute.org/en/research/esg-investing [https://perma.cc/SGQ3-GALF] (last visited Feb. 10, 2023) (explaining ESG, its purpose, and its implications for investment analysis). *See generally* Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381 (2020) (explaining ESG investing and its relationship to trusts and fiduciary duties for trustees).

distributions free of all federal estate taxation, and thus keep the trust perpetual. While a many-generations descendant of some dynasty trust might prefer termination of income entitlement in favor of a lump sum principal payout, this may not always be the case.[249] Drafters could also simply provide, by express terms in the trust document, that the settlor does not allow decanting.

Given these differing incentives, as a threshold matter, decanting should not be able to make an old fashioned two-generation trust into a perpetual or dynasty trust that was never contemplated by the original settlor. Indeed, trust practitioners in these states are hardly strangers to the use of decanting. Even if the incentive concern does materialize, a change to state termination commissions for corporate trustees could quickly remedy this. A "state could enact a race to the top perpetual trust regime" that would create a "commission schedule that dramatically increased termination commissions, or put termination commission terms into perpetual trusts" and thus "greatly increase trust department income short term, a very powerful lure."[250] There remains, however, the concern about settlors drafting around decanting if decanting is seen as a threat to dynastic control.[251]

In all, the great benefit of using decanting in trust instruments is that it may permit effective modification of the trust without judicial interference.[252] By using decanting, a trustee can make some modifications to the trust itself that could combat the eventual costs of unwieldy administration for perpetual trusts, as long as such modifications do not conflict with the express decanting limitations of the statutes. The true power of decanting, moreover, when considered through a lens of common recovery and strict settlement, is in its combination with modification. If courts allowed greater flexibility in combining decanting and modification, the ultimate effect would be a second trust created within the terms of the first that would be renewed, modernized, and potentially rid of any administrative burdens of an outdated trust. Combining modification and decanting, or using decanting alone wherever possible, allows for the refreshing of a trust instrument. Thus, decanting can be used as a form of strict settlement to ensure that the trust instrument is relevant while the trust itself—and its tax benefits—remain firmly in place. Therefore, this possibility remains less viable than modification by judicial means, but it is nevertheless an

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[249] Such reasons could include purchasing a house or business, paying off outstanding loans, or paying for some schooling to improve economic prospects. This desire is not dissimilar to the interest of converting land from fee tail to fee simple by way of common recovery, but an adult tenant in fee tail was always better off with a fee simple than with a fee tail, while a trust beneficiary may be better or worse off depending on their circumstances. *See supra* Sections I.A, I.B.

[250] *See* Dobris, *supra* note 166, at 2544 & n.32.

[251] *Cf.* Schanzenbach & Sitkoff, *supra* note 121, at 2470 (arguing rise of perpetual trusts since 1980s is better explained by settlors' desire for tax avoidance than by "dynastic impulses").

[252] *Cf.* Dukeminier & Krier, *supra* note 115, at 1331 (noting costs associated with judicial modification).

additional consideration that may only function in tandem with statutory change or judicial modification, unless decanting is made mandatory by statute.

4. Powers of Appointment for Perpetual Trusts

The final consideration stems from the use of powers of appointment, which likewise tracks with the prior two solutions and takes into consideration the tax-centric focus necessary to understand the true use and nature of modern perpetual trusts. If courts chose to add this power, or even wrote it into the trust through modification, then this would be the equivalent of a modification that affected common recovery, allowing a balance between flexibility and control.[253] Given that powers of appointment, even more so than decanting, are meant to be extrajudicial acts free from fiduciary duties, the case law on this matter is sparse, leaving statutory text alone as the principal consideration of the proceeding analysis.

In South Dakota, a later trust "may grant a power of appointment to one or more of the beneficiaries of the second trust who are beneficiaries of the first trust," which "may include the power to appoint trust property to the holder of the power of appointment, the holder's creditors, the holder's estate, the creditors of the holder's estate, or any other person, whether or not that person is a trust beneficiary."[254] This provision has since been modified in 2011 and now provides that "[b]efore exercising its discretion to appoint and distribute assets to a second trust, the trustee of the first trust shall determine whether the appointment is necessary or desirable" based on "the purposes of the first trust, the terms and conditions of the second trust, and the consequences of the distribution."[255] Thus, the statute permits a trustee to create a power of appointment without judicial intervention, but such grant must now take into account whether creating the power is "necessary or desirable" for the purposes of the first trust.[256] Meanwhile, no reported judicial decision in South Dakota has interpreted this statute or the new modifications to the statute.

Nevada law recognizes a power of appointment "that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over the appointive property."[257] While creating the right to form a power of appointment, this statute is based on the Uniform Powers of Appointment Act[258] and has no reported citing decisions. Similarly, Delaware permits nongeneral powers of appointment "[u]nless the

[253] Martin, *supra* note 104, at 58-59; Steven J. Oshins & Judith K. Ruud, *Dynasty Trusts in Nevada: Countdown to 12/01/02*, NEV. LAW., Oct. 2001, at 18, 33 (describing how powers of appointment can avoid risk of beneficiaries being "irrevocably locked into a trust arrangment forever . . . . by making outright distributions, thus terminating the trust, can easily finesse that perceived problem").

[254] S.D. CODIFIED LAWS § 55-2-15 (2023).

[255] *Id.*

[256] *Id.*

[257] NEV. REV. STAT. § 162B.075 (2021).

[258] *See* UNIF. POWERS OF APPOINTMENT ACT (UNIF. L. COMM'N 2013).

instrument creating a nongeneral power of appointment expressly manifests a contrary intent of the donor" for "all or a portion of the assets subject to such power" to be appointed "for the benefit of 1 or more objects of the power."[259] Lastly, in Tennessee, a second trust "[m]ay confer a power of appointment upon a beneficiary of the original trust to whom or for the benefit of whom the trustee has the power to distribute principal of the original trust," but is limited to "permissible appointees of the power of appointment" and cannot be used to "extend the permissible period of the rule against perpetuities that applies to the trust."[260] The statute likewise makes an express tax provision, stating that the power cannot be used if it would frustrate any one of a number of tax considerations.[261] As with South Dakota and Nevada, no reported case cites directly to this provision.

In applying powers of appointment, the GST once prevented the use of such powers from passing from generation to generation. Now such use is permissible in the states with the RAP abolished. If used, powers of appointment will allow each generation to control what happens to the property next while still maintaining the dynastic elements of the trust, as strict settlement allowed the maintaining of the dynastic elements of fees tail while still ensuring their limited scope.[262] It would still be within the settlor's intent of allowing control over time and avoiding tax and would ensure that the trust is used for and by the living, with the ability to change it over time.[263] The prudent drafter can effect this flexibility without concern over taxes either, thanks to the existence of the GST combined with the lack of a traditional RAP in the states that permit perpetual

[259] DEL. CODE ANN. tit. 25, § 505(a) (2023); *see id.* § 505(e) ("When a donee of a nongeneral power of appointment appoints . . . all or a portion of the assets subject to such power . . . such appointment shall be treated as having created . . . a separate trust . . . ."); Wilmington Tr. Co. v. Mills, No. 2019-0690, 2021 Del. Ch. LEXIS 130, at *27 (June 25, 2021) (noting Delaware's power of appointment statute only permits appointment to those who "are objects of the original power" (quoting DEL. CODE ANN. tit. 25, § 505)); Simmons, *supra* note 69, at 272 ("Delaware also specifically allows a trustee to grant a special or general power of appointment to a beneficiary of the new trust.").

[260] TENN. CODE ANN. § 35-15-816(c)(8) (2022).

[261] *Id.* § 35-15-816(c)(9).

[262] *See* Raatz, *supra* note 212, at 824.

[263] *See* Stephen E. Greer, *The Alaska Dynasty Trust*, 18 ALASKA L. REV. 253, 259, 274 (2001).

trusts.[264] Such tax-minded drafting must be wary of the "Delaware Tax Trap,"[265] which can occur in states with no RAP in place.[266] This "trap" is sprung where "a beneficiary exercises a non-general power of appointment to create a further trust, giving a successive beneficiary a non-general power of appointment," resulting in that power's exercise being subject to the federal gift or estate tax.[267] Insofar as the drafter is careful to avoid this outcome, such use of powers of appointment provides the necessary flexibility to impose limitations and refresh outdated perpetual trusts, as was the case with a modern use of decanting or with the strict settlement of the fee tail. Once again, the lens of the fee tail informs our understanding of this potential solution. There remains, however, the concern about settlors drafting around powers of appointment. As with decanting, if powers of appointment are seen as a threat to dynastic control. Therefore, this possibility also remains less viable than modification by judicial means, but it is nevertheless an additional consideration alongside statutory change or judicial modification unless decanting is made mandatory by statute.

CONCLUSION

Having traversed the history of perpetual grants from the earliest age of the common law, we have seen the potential for balance. This balance would not, unlike a constitutional challenge or federal statutory change, end perpetual trusts but rather would ensure that the duration of perpetual trusts is not to their detriment. This Note's goal has been to show not only that the findings of the Pandora Papers are a part of centuries of history on generational wealth control

[264] *See* Verner F. Chaffin, *Georgia's Proposed Dynasty Trust: Giving the Dead Too Much Control*, 35 GA. L. REV. 1, 18 & n.96 (2000) ("The definition of a general power of appointment for dynasty trust purposes is analogous to the definition set forth in I.R.C. § 2041 (b)(1) for determining whether property subject to a power is includible in the decedent's gross estate."); *see also, e.g.*, Lucy A. Marsh, *The Demise of Dynasty Trusts: Returning the Wealth to the Family*, 5 EST. PLAN. & CMTY. PROP. L.J. 23, 33 n.79 (2012) (citing Chris Stevenson, *Maine's Dynasty Trust Statute: The Product of Informed Judgment?*, 23 ME. BAR J. 224, 230 (2008)).

[265] The tax implications of nongeneral powers of appointment and the Delaware Tax Trap are found in the Internal Revenue Code. *See* I.R.C. §§ 20-2041, 25-2514. For a more robust discussion of the Delaware Tax Trap and its nuances, see generally Jonathan G. Blattmachr & Jeffrey N. Pennell, *Using "Delaware Tax Trap" To Avoid Generation-Skipping Taxes*, 68 J. TAX'N 242 (1988).

[266] Before 2011, drafters also had to take into account the use of the marital exemption for federal estate taxes, as well as the federal gift tax. *See* Martha W. Jordan, *Requiem for Pennsylvania's Rule Against Perpetuities?*, 46 DUQ. L. REV. 555, 572 (2008). However, new portability rules added in 2011 mean that there is no longer an issue of having money in a marital deduction trust when it should be in a perpetual or dynasty trust. *See generally* Jerome A. Deener, *New Portability Rules: A Cure for Incomplete Estate Planning*, J. OF ACCT. (July 1, 2012), https://www.journalofaccountancy.com/issues/2012/jul/20125070.html [https://perma.cc/656U-4JQZ].

[267] *See* Greer, *supra* note 263, at 276.

but also the analogous applicability of similar doctrines, once again resetting the balance between intergenerational control and judicial limitations.

This Note adopts a comparative historical approach to fees tail, the RAP, and perpetual trusts. It first surveyed the origins of perpetual trusts, including the entailment of estates, the rise and end of perpetuities in the seventeenth century, and the rush among U.S. states in the 1780s to abolish fees tail, before turning to the competitive rush to abolish the RAP in the 1990s, and the rise of perpetual trusts. This historical background has provided a more informed framework for considering state law on perpetual trusts. In connecting this historical background to a present concern, this Note surveyed the growing popularity of, and growing concern over, the fee tail's modern successor, perpetual trusts. Today, just as investments and financial assets have replaced real property as the central form of familial wealth, perpetual trusts are, in many ways, little more than modern forms of entailed estates. While trust-friendly states such as South Dakota have welcomed these trusts, scholars of trust and estates have been apt to point out the serious administrative complexities caused by the potentially infinite and unquestionably indefinite duration of perpetual trusts.

In proposing a solution to this problem, this Note analyzed the applicability of legal approaches that worked in past centuries to tame fees tail and perpetuities to new problems of perpetual trusts. It then connected these approaches to the possibility of modern state-level statutory reforms and judicial interpretations analogous to historical limitations on fees tail for perpetual trusts in those states that abolished their rules against perpetuities. This Note has demonstrated why constitutional arguments or federal statutory solutions are less viable options. Rather, through the promulgation of a model for state-level statutory reform and a comparative analysis of four state surveys on current trust statutes, this solution entailed—pun entirely intended—a judicial scheme analogous to the common recovery and strict settlement methods, which recognized the problems of the perpetual duration of the fee tail and limited their extent. Even in the absence of action by Congress or by state legislatures, this judicial solution, by combining an expanded and reinterpreted use of trust modification laws, decanting, and powers of appointment in states which otherwise permit perpetual trust, could provide a legal solution to the problems of perpetual trusts. For a long time, the solution to ending any perpetual grants was through invalidity by way of the RAP. But even where states have abolished the RAP by statute, this common-law-derived solution can still push back against the rise of perpetual trusts and ensure that, despite their existence, their perpetual duration will not permit perpetual control.