A DEFENSE OF PERPETUAL TRUSTS

INTRODUCTION

Why would anybody choose to create a trust that lasts forever? One reason might be vanity. Drafting a perpetual trust could be an attempt to claim a type of immortality for oneself. A charitable trust, for example, is often designed to last forever in order to perpetuate the name and legacy of its founder.[1] Another reason might be to create a family dynasty. Members of the current generation can protect their family's wealth from the bad decisions or bad luck of their descendants by transferring the family fortune into a trust.

Neither of these goals is particularly praiseworthy, and legal scholars have struggled to imagine more worthwhile uses for trusts designed to last forever. Across dozens of law review articles, perpetual trusts have been described as "folly,"[2] "foolish,"[3] and "utterly devoid of any significant offsetting justification,"[4] among other critiques. As Bridget Crawford has written, if you "throw a stone into a room full of law professors, it is virtually impossible to hit someone who will defend perpetual trusts."[5]

Seemingly, even those willing to support perpetual trusts do so only begrudgingly. Eric Rakowski, while ultimately concluding that perpetual trusts should be allowed, echoes legal academia's general unease when he admits that his "intuition...is that there is something unseemly or overweening in establishing perpetual trusts, whether to burnish one's memory or to boost a bloodline."[6]

In this essay, I emphatically defend perpetual trusts and recent state-level repeals of the Rule Against perpetuities. The scholarly debate over the *category* of perpetual trusts has focused exclusively on one *type*—the Dynasty Trust—which is designed to perpetuate wealth within

families by exploiting a tax loophole. The unsavory nature of both Dynasty Trusts and the legal reform movement that spawned them has blinded us to a universe of perpetual trusts that are socially beneficial.

In Part I, I sketch the history, structure and function of four types of perpetual trusts: Dynasty Trusts, Private Foundations, Stewardship Trusts, and Ancestor Trusts. All are designed to last forever, but perpetuity serves a distinct purpose for each. I argue that when legal scholars critique perpetual trusts, they are really talking about Dynasty Trusts in particular. The Rule Against Perpetuities, however, indiscriminately voids all types of perpetual trusts.

In Part II, I walk through some abstract arguments for and against the existence of perpetual trusts, and apply each argument to the four types of trusts described in Part I. I aim to show that some objections are overstated or better addressed through taxes than an outright ban, and that others only apply to Dynasty Trusts and not to Private Foundations, Stewardship Trusts, Ancestor Trusts, and other potential perpetual trusts.

In Part III, I provide a brief history of the Rule Against Perpetuities (the "Rule"). Its background as a hallowed and fiercely debated legal doctrine provides context for the legal academy's intense opposition to perpetual trusts.

I. TYPES OF PERPETUAL TRUSTS

There is a vast, unexplored universe of potential trusts.[7] As Frederik Maitland wrote, "to classify trusts is like classifying contracts"[8]—the space has too many dimensions to draw a clean taxonomy. One such dimension is duration. Most trusts are designed to eventually terminate. Revocable living trusts, for example, are typically designed to terminate on the settlor's death after the trust's assets have been distributed. A family trust is often designed to make distributions for

children and grandchildren, terminating after distribution of any remaining principal to living beneficiaries at the death of the last grandchild. Many of the functions that a trust might serve are time-limited: after a certain point, the trust no longer has any purpose. Some trusts, however, have functions that are specifically served by perpetual duration.

A. Dynasty Trusts: Testamentary Trusts to Minimize Long-term Transfer Taxes

In 1986, Congress passed a new generation-skipping transfer tax (GST) in order to close a loophole in the estate tax system. The estate tax is meant to apply to wealth as it passes from one generation to the next in order to decrease wealth inequality. Its design assumes that most testators will leave the vast majority of their wealth to their children, who will leave the vast majority of their wealth to their children, and so on. Extremely wealthy testators, however, were able to bypass some estate taxes by bequeathing significant assets directly to their grandchildren. Those bequests that would have incurred an estate tax at each transfer if the assets were passed down one generation at a time only incurred a single estate tax on the initial transfer to the grandchildren.

The GST imposes a tax at the same rate as the estate tax on transfers to any "skip person"—a recipient two or more generations removed from the transferor. In doing so, it approximates what the estate tax would have collected in the transfer from children to grandchildren. In order to keep GST treatment consistent with estate tax treatment, Congress included an exemption of an equal amount to the estate tax exemption. The idea, once again, was that if a testator were to bequeath their estate to their children, who then were to leave it to their children, each generation would be eligible for the estate tax exemption.

In congressional hearings regarding the GST, some attorneys warned Congress to reconsider the exemption. From their perspective as estate planners, they could see that the exemption to the

new tax would incentivize more generation-skipping transfers than ever before.[9] The exemption represented an opportunity to transfer significant assets to future generations immediately while ensuring that no transfer tax would ever be due. And the exemption was highly salient—it would be easy to sell to clients. Congress ignored the warnings and included the exemption in the final bill.

In addition to taxing direct transfers to skip persons, the GST also applies to distributions from trusts. When a trust makes a distribution to a beneficiary who is two or more generations removed from the settlor, that distribution triggers a GST tax. However, if the initial transfer to the trust qualified for the GST exemption, all future distributions from that trust are exempt as well. In other words, if a testator transfers the full GST exemption amount into a trust, distributions from that trust will never incur a GST tax.

Some believe that Congress must have assumed that the Rule Against Perpetuities would provide a backstop to limit the potential value of the GST tax exemption to family trusts. Under the Rule, a trust would terminate after two to three generations, limiting the value of the exemption.[10] If Congress was counting on the Rule, it severely underestimated the entrepreneurial spirit of the trust industry and state legislatures. Once the exemption was in place, the Rule was quickly repealed in the majority of states. With no effective limit on trust duration, the GST exemption realized its full potential.

The Dynasty Trust was invented to capitalize on this new tax planning opportunity. While there's no formal definition of a Dynasty Trust, the trade name is commonly used by trust companies to sell estate planning instruments designed to take advantage of the GST exemption. Dynasty Trusts are typically drafted to pay income to all descendants of the settlor, while reserving enough principal to ensure that the trust lasts forever. For Dynasty Trusts, perpetuity is paramount,

since each new generation takes advantage of a tax break that otherwise would be forfeited. The longer the duration of a Dynasty Trust, the greater its tax advantage.

To ensure their security from irresponsible heirs, Dynasty Trusts are typically drafted as spendthrift trusts, which protect their assets from the creditors of beneficiaries. The settlor might also choose to include decanting powers for the trustee, so that they can transfer the corpus to a new trust if needed in order to adapt to changes in tax or trust law. In general, since Dynasty Trusts are designed to last as long as possible, the settlor will most likely wish to give the trustee maximum flexibility. And in choosing a trustee, the settlor of a Dynasty Trust would typically select a corporation, which has also been granted perpetual existence by the state.

The size of the typical Dynasty Trust has grown significantly over the years. When Congress introduced the GST in 1986, the estate tax exemption (and thus, the GST tax exemption) was set at $1 million.[11] Today the exemption is over $11.5 million per person or over $23 million per married couple. Moreover, crafty estate planners can easily manipulate assets to decrease the value of property in the eyes of the IRS. For example, the IRS routinely applies discounts of up to 50% for lack of marketability and control in shares of closely held businesses. Testators can be surprisingly transparent and still receive favorable treatment—with standard planning, a settlor might be able to pass close to $50 million in assets tax-free via a Dynasty Trust.[12]

A perfect storm has brought about conditions that make Dynasty Trusts extremely valuable to high-net-worth individuals. The generous estate and GST tax exemptions are set to be cut in half in 2025 if not decreased sooner under the new administration. Financial planners are advising their wealthiest clients to put the full exemption amount of over $23 million per married couple into Dynasty Trusts as soon as possible, in order to lock in the tax benefits before it's too late.

B. Private Foundations: Purpose Trusts for Public Benefit and Family Legacy

In general, every trust is required to name identifiable beneficiaries. The beneficiaries of a trust are incentivized to monitor the trustee and ensure their compliance with the terms of the trust. As such, they have standing to enforce the trust in court. A purpose trust—a trust that distributes assets in order to promote a purpose, rather than directly to named beneficiaries—has no such natural enforcer. The absence of a person with incentive and standing to enforce the trust has historically caused trusts without an ascertainable beneficiary to be void at common law.[13]

Since the sixteenth century, however, a subset of purpose trusts that are dedicated to a "charitable" purpose have been permitted by the courts. At first, courts granted standing to any member of the public to enforce a charitable purpose trust, since each person was ostensibly a member of the class that stood to benefit. However, given that no individual member of the public is properly incentivized to enforce a charitable trust on their own, it was easy for trustees to get away with mismanagement or fraud.[14]

Beginning with the Statutes of Charitable Uses in the seventeenth century, trusts with a charitable purpose have had their enforcement duties assigned to an office of the state. The Statutes of Charitable Uses also exempts charitable trusts from the Rule Against Perpetuities, making them the only type of trust (until recently) that could be designed to last forever.[15]

Trusts for charitable purposes have served important cultural roles throughout history as a form of associational group.[16] There are many reasons why an association might choose to organize privately, as opposed to as a corporation under a charter from the state. The trust, as an unincorporated body that could hold legal title to property, enabled the existence of such associations.[17] Maitland goes as far as to argue that "all that we English people mean by 'religious liberty' has been intimately connected with the meaning of trusts."[18] Minority religions in England

that once were prohibited from incorporating were nonetheless allowed to self-organize as perpetual charitable trusts. Even after England embraced religious freedom, many religious organizations chose to stay privately organized as a charitable trust rather than to incorporate.[19]

In the United States, the charitable trust has been similarly impactful. In early cases, US courts were suspicious of charitable trusts. Judges feared the accumulation of massive estates by religious institutions and were wary of letting individuals create trusts that would last forever.[20] By the late nineteenth century, however, the charitable trust had been cemented as one of the most "favored creatures of the law."[21] Societal changes had made charitable trusts too important for the law to stand in their way. During a time when wealth inequality was soaring and poverty was pervasive, wealthy individuals provided important social services through their charitable trusts.[22]

While most charitable trusts are undoubtedly created with good intentions, many are formed in response to incentives provided by federal tax law. The estate tax grants a 100% up-front deduction for charitable bequests. Many testators choose to donate to existing charities in order to take advantage of the tax break and to give back to society. For wealthier individuals, however, there may be significant advantages to setting up a private charitable foundation ("Private Foundation").[23]

A Private Foundation is a type of charitable purpose trust that does not engage in charitable work directly, but instead distributes funds to other organizations. In order for a bequest to qualify for the charitable estate tax deduction, the trustee of the recipient trust must be directed to distribute at least five percent of the trust's principal each year.[24] Since the average annual return on investment approximates five percent, a Private Foundation that spends the minimum required amount may exist forever without running out of funds.[25]

For a testator who desires immortality, a perpetual Private Foundation has much to offer. For

the dynasty-minded, the five percent minimum annual distribution can be spent on operating expenses such as salaries for family members acting as trustees, or on annual meetings at desirable locations.[26] For those more dedicated to public service, Private Foundations allow the testator to associate their name with grants from the trust in perpetuity.

Not all charitable trusts are designed to last forever. There are good reasons to advocate for the wealthy to put their assets into direct service today rather than to invest the majority of their estate in financial markets. Last century, Julius Rosenwald, an owner of Sears, Roebuck and Company, worked to discourage his fellow philanthropists from tying up their bequests in perpetual Private Foundations.[27] More recently, the Bill and Melinda Gates Foundation has committed to spending its entire fund within fifty years of the death of the last of its trustees: Bill Gates, Melinda Gates, or Warren Buffet.[28]

Since charitable trusts have long been granted perpetual life, courts have been forced to develop a doctrine to deal with changing circumstances. When the world has changed in such a way that carrying out the terms of a charitable trust either no longer furthers the intent of the creator or is rendered impossible, the court will alter the terms of the trust under the cy pres doctrine. In general, courts are extremely deferential to the terms of a charitable trust. The cy pres doctrine is only employed in extreme situations, but it does provide a model for how courts might modify other, newly allowed perpetual trusts.[29]

C. Stewardship Trusts: Business Trusts to Lock In Corporation Mission

For a trust's purpose to be deemed "charitable," it must direct the trustee to benefit the public.[30] On the other side of the spectrum are those trusts with purposes that harm the public. Historically such purposes were deemed "superstitious;"[31] today, they include any purpose that is against

public policy, or is "anti-social."[32] Originally, courts conceived of nothing in between—a purpose trust was either charitable and favored, or noncharitable and void.[33]

In the United States, a third category of purpose trusts emerged with the promulgation of the Restatement of Trusts. The Restatement, with Austin Scott as reporter, carved out a new doctrine for trusts with purposes that were not charitable yet not anti-social. Such intermediate purposes can be classified as either *personal*, with purposes akin to consumption by the testator, or *social*, with purposes that benefit other living people but in a way that does not qualify as charitable under the relevant statute. Examples of personal purposes include trusts for the care of a gravesite or pet; examples of social yet noncharitable purposes include trusts to encourage a particular hobby or pastime.[34]

Under the *Restatement*, trusts drafted for such an intermediate purpose are no longer immediately void, but neither are they enforceable trusts. Rather, the trustee has the power, but not the obligation, to carry out the terms of the trust. They may choose to do so, in which case the trust may continue to exist; but if they choose not to, the court does not assign another trustee. Instead, the trust property is distributed to the residual takers of the estate.[35] Scott's tripartite structure, and the "honorary trusts" it enables, was designed to strike a balance between tradition and practicality. If a trustee is willing to carry out the terms of a non-harmful, noncharitable purpose trust, why should the court stand in the way of the testator's intent? Under the Restatement, such honorary trusts are allowed to exist, but, unlike charitable trusts, are subject to the Rule Against Perpetuities and so cannot be created with perpetual duration.[36]

For most of the twentieth century, honorary trusts occupied a liminal space in American trust law. Finally, in 2000, the Uniform Trust Code (UTC) validated honorary trusts and began to treat them as fully enforceable trusts. The UTC § 408 enables trusts for the purpose of caring for a pet,

and § 409 enables all other noncharitable purpose trusts.[37] Noncharitable purpose trusts drafted under these sections have three key differences from charitable trusts. First, noncharitable purpose trusts under the UTC cannot be created for an indefinite duration. Instead, the UTC suggests either a maximum duration of twenty-one years, or that the statute should tie the maximum duration to the period of the state's Rule Against Perpetuities.[38] Second, the UTC allows judges to reduce the amount held in a trust for a noncharitable purpose if they find that that it is in excess of what is needed to further that purpose.[39] Third, the UTC creates a "trust enforcer" role to enforce the terms of the trust against the trustee. The trust enforcer is either named by the settlor or by the court.[40]

In drafting §409, what the UTC had in mind were those types of trusts that were already being created as honorary trusts, with purposes such as "care of animals, care of graves, and a power to distribute property for benevolent purposes."[41] As more and more states have adopted the UTC, however, more potential uses for purpose trusts have become apparent. One such unexpected use for noncharitable purpose trusts has been as a form of business organization.

In 2019, an Oregon food distribution business called Organically Grown Company (OGC) sought out a new business structure that would allow it to lock in its corporate mission as its founders transitioned into retirement.[42] OGC's attorneys suggested converting to a steward-owned company, with the goal of separating equitable ownership from management in a way that would allow management to focus on the business's purpose, long-term goals, and diverse groups of stakeholders.[43]

A noncharitable purpose trust formed under § 409 can be used to structure a steward-owned business. A trust is created with a purpose that reflects the mission of the business, the current holders of voting stock in the corporation transfer their shares to the trust, and the trustee elects directors to the Board of the corporation. OGC considered creating a purpose trust in Oregon,

which had adopted § 409 of the UTC, but noted two issues with the statute when utilized for business trusts. First, Oregon's statute limits the duration of noncharitable purpose trusts to ninety years, in order to match its Rule Against Perpetuities. Second, the statute allows judges to reduce the amount held in the trust if they find that it is in excess of what is necessary for the trust's purpose. For OGC, these features of the statute limited the control that they would have over the future of the trust that would hold their business.

Other states have adopted more flexible versions of § 409. Delaware, for example, does not limit the duration of noncharitable purpose trusts, and it does not allow judges to reduce the amount held in such trusts. In South Dakota a judge may reduce the amount held in trust, but the statute introduces useful default laws and procedures designed to ease the administration of purpose trusts.[44] OGC ultimately decided to organize as a perpetual, noncharitable purpose trust in Delaware.

The attorneys who represented OGC subsequently worked with the Oregon legislature to craft a statute to facilitate the creation of the type of perpetual purpose trust that OGC had set up in Delaware. Their idea was to select default rules and procedures that would act as a guide to companies looking to restructure under steward-ownership. In 2019, Oregon passed HB 2598 which enables Stewardship Trusts to be formed in their state.[45]

An Oregon Stewardship Trust is designed to hold legal title to a business that itself is organized as a corporation. The settlor names a trust enforcer to enforce the trust. Stewardship Trusts are directed trusts—a stewardship committee of at least three members is granted all of the powers of the trustee. The stewardship committee has the right to vote the shares of the business, and so is responsible for electing directors. The statute provides reporting requirements between the roles—trustee, stewardship committee, and enforcer—to ensure that each party has the information

necessary to fulfill its duties. Stewardship Trusts are exempt from Oregon's Rule Against Perpetuities.[46]

The statute provides a very flexible structure and leaves open the composition of the stewardship committee. In OGC's trust, the stewardship committee is comprised of five representatives from five groups of stakeholders: employees, farmers, customers, community allies, and investors. Each group of stakeholders elects one representative to the committee. In order to vote for a representative, a stakeholder must be actively involved in the business.[47]

Businesses converting to a Stewardship Trust structure often require liquidity in order to buy out existing shareholders, especially since the transition often coincides with a generational change in leadership. A business structured as a Stewardship Trust can't finance its operations by selling voting shares, since the goal is for the trust to have complete control of those shares. It can, however, borrow money or sell preferred nonvoting shares. At OGC, they financed their transition through a loan from a social finance company and by selling preferred shares that pay a five percent annual dividend and are redeemable in five years.[48]

The Stewardship Trust is one of many organizational models that a steward-owned business might choose. The Purpose Foundation describes four additional structures for steward-owned businesses, each of which leverage the new noncharitable purpose trust form.[49]

D. Ancestor Trusts: Testamentary Trusts to Pass Down Digital Heirlooms

The Dynasty Trust and Stewardship Trust are both examples of legal innovations developed in response to changes in the law and society.[50] The Dynasty Trust responds to the generous GST exemption and a growing market of ultra-wealthy individuals. The Stewardship Trust responds to legal enforcement of noncharitable purpose trusts and new business norms that favor long-term

thinking. Both were made possible by the exemption from or repeal of the Rule Against Perpetuities.

Until the law of trusts changed to allow perpetual trusts, there was no evidence of explicit demand for Dynasty Trusts or Stewardship Trusts. No group advocated for repeal of the Rule Against Perpetuities in order to enable these new trust forms. "Testators tend to follow familiar channels"[51]—a change in the law is sometimes required in order to reveal a new path. When conditions change, a "norm entrepreneur" can transform convention.[52]

In describing multiple types of perpetual trusts, my aim is to show that the category contains more than just Dynasty Trusts. But more importantly, the history of Dynasty Trusts, Private Foundations, and Stewardship Trusts suggests that the category of perpetual trusts is bound to grow. Now that perpetuity is available and salient to estate planners, new perpetual trust instruments are likely to emerge in order to meet latent demand. Here I present what I call an "Ancestor Trust" as one such example of what perpetuity might afford even those testators who do not seek to create a dynasty.

Dynasty Trusts hold *fungible* property—assets that are reducible to money and valued by the market. Testators also leave behind what Margaret Radin calls *personal* property—things that are bound up with our identities and that are nonmonetizable.[53] Historically, estate planners have tended to trivialize or overlook personal property dispositions,[54] and scholars have devoted little attention to the inheritance of possessions.[55]

This represents a missed opportunity. Personal property and its corresponding narratives are valuable assets in the hands of a testator and their descendants.[56] We acquire objects over time that become a part of our identity. When people are dying, they tend to organize such artifacts with the intention of preserving and communicating their identity through gifts to family members.[57]

Critically, the objects are not valuable in isolation; only in combination with a narrative does personal property maintain its value as it traverses generations.[58]

Ancestor Trusts are designed to hold "digital heirlooms." Imagine that your great-grandmother had digitized her family photographs and videos, gathered her favorite digital books, songs and movies, created 3D images of her most meaningful travel souvenirs and heirlooms, and transcribed her diary entries and love letters. Imagine that she had put each of these digital assets, along with a corresponding message or story, into a perpetual trust, to be distributed to you, your relatives, and your descendants at important milestones throughout their lives. An Ancestor Trust would be designed to hold this type of digital, personal property and to facilitate this pattern of disposition.

Historically, passing down personal property would inevitably result in the narrative becoming detached from the object over time. There was also always a risk that the object might be lost or broken, or that the property might take up too much space. And personal property cannot be divided, so a testator is forced to decide who should receive each of their singular cherished possessions.[59] Such decisions cause stress to the testator, and a miscalculation could result in their property being left to a recipient who does not value it. By holding digital rather than physical heirlooms, Ancestor Trusts are not subject to these risks and limitations.

For ease of administration, an Ancestor Trust could be structured as a noncharitable purpose trust as opposed to naming beneficiaries, as a Dynasty Trust typically would. If the settlor chooses a purpose such as "promoting an intergenerational bond within my family" and gives the trustee detailed instructions, the trust can continue to be administered efficiently even as the number of descendants grows geometrically over time.

Using a purpose trust would also mitigate some of the risk to trustees that would be inherent in administering a trust with thousands of named beneficiaries. The trustee has a fiduciary duty to

avoid distributing trust assets to non-beneficiaries as well as a duty of impartiality, which might require a trustee to consult with each beneficiary and weigh their relative needs.[60] In a purpose trust, the trustee's duties are channeled into carrying out the trust's singular purpose, as opposed to running directly to thousands of individual beneficiaries.

A common critique of perpetual trusts is that by weighing down property with conditions, settlors increase their own well-being at the expense of beneficiaries. This is a rather pessimistic view of the effect that a trust has on its constituent property. In the case of cherished, personal property the items become endowed with meaning as they are preserved, communicated, and passed down[61]. In the case of an Ancestor Trust, the conditions of the trust serve to amplify the property's value with each subsequent distribution.

The universality of personal property makes the Ancestor Trust an ideal vehicle for encouraging more people to become testators.[62] Our inheritance system prioritizes freedom of testation, yet less than half of adults make an estate plan. Most of us won't die with a large estate, but we will all die owning some cherished personal property.

II. Costs and Benefits of Perpetual Trusts

Much ink has been spilled debating the abstract costs and, to a lesser extent, benefits of perpetual trusts. Arguments made in favor of reinstating the Rule Against Perpetuities and against the existence of perpetual trusts take three general forms: economic, normative, and paternalistic.[63] Economic arguments focus on inefficiencies created by perpetual trusts, and the social costs they impose. Normative arguments center on liberty and fairness consequences that follow from the existence of perpetual trusts. Paternalistic arguments take the view that a rational, informed testator would not desire to create a perpetual trust and that the primary beneficiaries of perpetual trusts are bankers and lawyers.

My goal in this Part is not to engage in a detailed analysis of each argument against perpetual trusts. Rather, I will briefly describe them and discuss how each might apply to the four types of perpetual trusts discussed in Part I. My aim is to show is that most traditional critiques that are levied against the category of perpetual trusts only apply to Dynasty Trusts in particular. Other types of perpetual trusts not only impose fewer social costs than Dynasty Trusts, but also have the potential to generate substantial social benefits.

A. Economic: The Use of Perpetual Trusts Imposes Social Costs

While a trust in and of itself does not represent an economic activity, it can "[change] the effect of [an] activity from one that internalizes a particular negative cost to one that externalizes that cost."[64] Certain types of trusts enable more deflection of otherwise private costs than others do.[65] It has often been argued that perpetual trusts in particular are used in connection with activities that generate social costs.

1. Perpetual trusts impose restraints on the use and marketability of property.

The original rationale for the Rule Against Perpetuities was grounded in economic efficiency. Centuries ago, land was the primary means of production and form of wealth. As such, free alienability of land became a critical norm for the courts to uphold. The goal was to balance the interests of families in managing their land across generations with the interests of society in ensuring that land was being used efficiently.

Today, the critique that perpetual trusts restrict alienability of property no longer applies for several reasons. First, and most importantly, trustees are now subject to the "prudent investor" standard. Where previously the standard for trustee liability encouraged overly cautious investment strategies, the current standard embraces modern portfolio theory and requires trustees

to trade as a prudent investor would.[66] The new standard protects against property being held in a perpetual trust that would otherwise be sold to an owner who values it more.[67] Second, land no longer represents a significant repository for generational wealth.[68] Instead, wealth today primarily takes the form of contract rights against financial organizations.[69] Even if the alienability of such assets were restricted within a trust, it would not generate the same kind of negative externalities that inalienability of land once did. Third, there are other doctrines in existence today that prevent trusts from inefficiently constraining the alienability of assets without imposing a ban on perpetual trusts in general.[70]

2. Perpetual trusts incur high administrative expenses compared to short-term trusts.

It might seem intuitive that perpetual trusts would incur higher administrative expenses than would short-term trusts. In some trusts, the number of beneficiaries grows over time and attendant administrative costs may grow as well.[71] In general, the world changes and imposes some unavoidable costs as trusts are forced to adapt along with everyone else.

The number of beneficiaries of a Dynasty Trust does grow geometrically over time. However, it is far from clear that beneficiary growth implies similar growth in administrative costs.[72] Additionally, advances in technology are likely to keep pace with any inherent complexity that arises from perpetual duration. Many tasks that formerly required the manual work of a trustee have been automated by software.[73] In any case, the potentially high administrative cost of Dynasty Trusts is no reason to ban them outright. Testators and trustees should have the power to decide for themselves whether administrative fees for a particular estate planning device are too high.[74]

As purpose trusts, the other three perpetual trusts described in Part I—Private Foundations, Stewardship Trusts, and Ancestor Trusts—do not experience any growth of beneficiaries over

time. As such, this particular argument does not apply to them with any force. One might argue that administrative costs are bound to rise as time goes on, since it will become more difficult for the trustee to apply the trust's original purpose to new circumstances. But this risk seems no more significant for perpetual trusts than it does for any long-term agreement or instrument.

3. Perpetual trusts grant too much "dead hand control."

One significant difference between perpetual trusts and time-limited trusts is that the original settlor, beneficiaries, and trustee of a perpetual trust are likely to terminate before the trust does. This dynamic introduces a host of potential inefficiencies that can be grouped under the heading of "dead hand control." John Langbein describes the "anti-dead-hand principle" as "fundamentally a change-of-circumstances doctrine."[75] Where a living person can respond to changes in the world and to personal appeals, a deceased person is unable to recontract.[76]

Any agreement that binds future parties is subject to this type of risk.[77] In general, however, the law does not ban long-term agreements just because changing circumstances might render the original terms inefficient or obsolete. Rather, either the agreements themselves or legal doctrines will tend to allow for modification. For example, corporations may exist perpetually, but their bylaws may be modified by current owners.[78] The cy pres doctrine of charitable trusts allows for the modification of a trust's terms if they become impossible, impractical, or wasteful.[79] A similar doctrine could be applied to noncharitable perpetual trusts. Indeed, both the Uniform Trust Code and the third Restatement of Trusts allow the court to modify the substantive terms of all trusts, where modification will "further the purposes of the trust," in light of "circumstances not anticipated by the settlor," and in line with their "probable intention."[80]

The problem of "dead hand control" exists to some extent in all types of perpetual trusts. But with a well-designed modification doctrine in place, an outright ban on perpetual trusts is "too

blunt an instrument to cure the problems that may arise during the life of the trust."[81]

4. Perpetual trusts cause concentrations of wealth that decrease overall welfare.

Under current laws, massive amounts of wealth can be transferred tax-free to future generations through the use of Dynasty Trusts. In addition to egalitarian and liberty concerns related to wealth inequality, Eric Kades argues that the widespread use of Dynasty Trusts could lead to an excessively high economy-wide savings rate and to a decrease in the power of economic stimulus to affect savings during downturns.[82]

Paternalistic critiques of perpetual trusts take the perspective that the beneficiaries of a Dynasty Trust will outgrow the principal, and that over time the corpus of a Dynasty Trust will dwindle away. Kades applies new empirical research from Thomas Piketty to show that the opposite is true. One of Piketty's most striking conclusions is that while the average return on capital is 4%, wealthier people earn as much as 6% or 7%.[83] It turns out that an extra 2-3% in returns each year can make a huge difference over a generation.[84] At the same time, wealthier people tend to have fewer children. [85] While scholars have tended to focus on the geometric growth of beneficiaries in a Dynasty Trust, they have ignored the fact that wealth grows geometrically as well.[86]

With this new data in hand, Kades shows that the value of a Dynasty Trust will not erode over time. Rather, Dynasty Trusts funded with the full GST exemption today will likely be able to provide enough income to all future beneficiaries that they will never need to work, while saving enough to outpace the growth of the economy.[87] In fact, some Dynasty Trusts can afford to impose savings rates of up to 90% while still providing high real incomes to all beneficiaries.[88]

In general, the economy would benefit from a higher savings rate than we have today. The "golden rule" rate—the rate that maximizes consumption—is likely 13% or 14%, and the U.S. savings rate has ranged between 2.5-7.5% since the late 1990s.[89] But with enough Dynasty Trusts

funded with enough wealth, their use could plausibly drive up the nationwide savings rate to a point where they would "enervate the power of fiscal stimulus to pull the economy out of recessions" and potentially even exceed the "golden rule" rate.[90]

This risk does not apply to non-Dynasty perpetual trusts, but it is a significant risk given present concentrations of wealth. However, the solution is not a rule to ban perpetual trusts, or even to prohibit Dynasty Trusts. Instead, the government should impose taxes to offset these externalities.[91]

B. Normative: Perpetual Trusts are Unfair to Future Generations and Threaten our Liberty

In addition to potential economic costs that result from the use of perpetual trusts, critics have identified normative arguments that weigh against allowing trusts to last forever.

1. Perpetual trusts lead to an aristocratic class that threatens democracy.

In December, 1776, North Carolina adopted a constitutional ban on perpetuities in the following provision of their Declaration of Rights: "[P]erpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed."[92] Today, nine state constitutions contain a similar prohibition. Like the Thirteenth Amendment to the federal Constitution, these state perpetuity bans apply to private conduct as well as state action.[93] The word "perpetuity" in these constitutions refers to the entailment of property—the creation of an "endless series of future interests."[94]

The function these constitutional bans were designed to serve was not to promote egalitarianism, but liberty. In England, entailed estates had concentrated wealth in ways that ultimately concentrated political power in the hands of a small group of families.[95] The anti-democratic nature of the English landed aristocracy was highly salient to American lawyers in the

eighteenth century. The entail, or perpetuity, was closely associated with English family dynasties.[96]

Although the original fear of perpetuities expressed in these state constitutions was specific to entailed land, the increasing wealth inequality that the use of Dynasty Trusts contributes to may result in similar democratic harms today. Changes to wealth and transfer tax laws can help to protect against threats to liberty caused by wealth inequality.

To a lesser extent, the use of Private Foundations can also contribute to the creation of an aristocratic class. While Private Foundations do not distribute dynastic wealth directly, they do serve to concentrate wealth within the control of relatively few families. The wealth contained in a Private Foundation can be wielded for political purposes. The use of Stewardship Trusts does not create any risk of promoting aristocracy—in fact, if enough businesses transition to steward-ownership, the effect might be to empower previously disenfranchised groups. The use of Ancestor Trusts does not implicate concerns about liberty or aristocracy.

2. Perpetual trusts promote the interests of the current generation at the expense of future generations.

Receiving a substantial inheritance can be both a blessing and a curse.[97] Bill Gates, Andrew Carnegie, and Warren Buffet each publicly recognized the harm that they believed would follow from bequeathing extreme wealth to their children, and chose to leave the bulk of their estates to charity.[98] A Dynasty Trust takes that choice away from future parents. The settlor alone determines what riches members of future generations will receive, and in doing so has the power to fundamentally shape their lives from the distant past.

This theme of a conflict between the giver and receiver is pervasive in scholarship on inheritance legal systems. The Anglo-American system of inheritance is seen as favoring the giver, by advocating for testamentary freedom even at the expense of beneficiaries. In recent years,

reformers have called for more emphasis on the receivers, by promoting familial responsibilities, reciprocal relationships, and the interests of caretakers.[99]

Shelly Kreiczer-Levy argues that envisioning inheritance as a zero-sum game between givers and receivers misses something crucial about its nature. Unlike other transfers, inheritance takes place in response to our mortality.[100] By providing a means of continuity, inheritance systems benefit both givers and receivers. For the giver, inheritance provides the continuity of the self after death; for the receiver, inheritance provides the continuity of roots and a corresponding sense of resilience and belonging.[101] The intergenerational bond supported by the institution of legal inheritance helps to foster a tendency for long-term thinking and a sense of intergenerational community.[102]

To the extent that the interests of current and future generations are in tension, the use of Private Foundations, Stewardship Trusts, or Ancestor Trusts does not exacerbate it. Not every condition placed on an asset decreases its value to the recipient. In the context of intergenerational projects, allowing the living to create trusts designed to last forever benefits future generations as well.

C. Paternalistic: Perpetual Trusts are Bad for Settlors

Some of the most strident critiques of perpetual trusts take the form of a paternalistic concern for settlors. According to this view, if only settlors were presented with the math behind perpetual trusts, they would not choose to create them.[103] When scholars make this argument, the type of perpetual trust they have in mind is a Dynasty Trust.

With each generation, the settlor's relatedness to beneficiaries decreases. After about 300 years the settlor will be no more genetically related to beneficiaries of their Dynasty Trust than they are to any randomly selected member of the population.[104] At that point, the settlor is likely to have

left over 16,000 descendants over fourteen generations who would each stand to benefit under a Dynasty Trust.[105] Given this math, some legal scholars have expressed incredulity at the idea that a well-informed settlor would choose to transfer their wealth to this enormous group of genetic strangers.

And yet, Dynasty Trusts remain enormously popular among the wealthy. A perspective focused on genetic relatedness seems to overlook something essential about ancestry. Our interest in connecting with generations far removed from us within our family tree has little do to with biological relatedness and much to do with continuity. We each have an interest in understanding where we come from.[106] In any case, the fact that some settlors might not value them is no reason to ban Dynasty Trusts from existing.

A related argument claims that costs of administration and inflation combined with geometric growth of beneficiaries will cause distributions from Dynasty Trusts to decrease over time.[107] Such predictions, however, rely on faulty assumptions that underestimate the trust's likely annual return rate and overestimate the rate of beneficiary growth. But even if a Dynasty Trust were not able to guarantee meaningful wealth to every descendent, a settlor can still satisfy their dynastic impulse by vesting one member of each generation with the power to distribute trust assets. Doing so preserves the wealth and stature of the family over time, even though not every descendant are guaranteed individual wealth.[108]

D. Benefits of Perpetual Trusts

Those legal scholars who have defended perpetual trusts have mostly done so in response to criticism. As such, the defenders tend to be agnostic rather than enthusiastic about the existence of perpetual trusts.[109] In this essay I have attempted to present a more robust defense by illustrating

several socially beneficial types of perpetual trusts and arguing that traditional critiques of perpetual trusts are better directed towards Dynasty Trusts in particular.

In addition to these illustrations, there are several abstract arguments that weigh against banning perpetual trusts. First, John Langbein has argued that trusts are more than merely analogous to contracts—they *are* contracts.[110] Unlike trust law, the law of contracts imposes no time limit on agreements.[111] Adam Hirsch argues that by recognizing the intimate relationship between the law of gratuities and contract law, inconsistencies between the two doctrines are drawn into sharp relief:

> The foundational claim of this Article is that associating the law of gratuities with the law of contracts, gathered within a reconfigured category of *transfers*, would pay conceptual dividends and, at the end of the day, promote public policy. . . . Simply by identifying gratuities and contracts as kindred problems, we call attention to doctrinal asymmetries that have taken shape–and then press lawmakers either to smooth out those asymmetries *or to vindicate them*, in the face of provisional skepticism.[112]

Distinct from the value of harmonizing the law of trusts with the law of contracts, the economic efficiency associated with freedom of contract applies with equal force to freedom of testation.[113] Banning perpetual trusts has a negative effect on the utility of those who would have otherwise created one. There is also a libertarian argument to be made that people should be allowed to do as they like with their property, and that banning the creation of perpetual trusts infringes on their natural rights. Richard Epstein argues that "[o]wnership acquired by first possession is and should be of infinite duration."[114]

The Rule Against Perpetuities is one of the common law's most iconic and long-lasting doctrines. As such, supporters of perpetual trusts have generally been forced into a defensive posture. But a rule to limit the duration of trusts is out of step with the associated law of contracts, and imposes social costs by limiting the utility of would-be settlors of perpetual trusts.

III. A Brief History of the Rule Against Perpetuities

To understand the source of the intense opposition to perpetual trusts, it will be helpful to end with a brief discussion of the Rule Against Perpetuities (the "Rule"). Some of the vitriol directed towards perpetual trusts can be interpreted as a defense of the Rule. The Rule Against Perpetuities is no ordinary legal doctrine—it is the "*sanctum sanctorum* of the law," and has provided lawyers with "a blessed sheltering realization that lives-in-being-and-twenty-one years have the same validity after two world wars. . . that they had when Queen Victoria ascended the throne."[115] It is currently dying an ignoble death, and the recounting history that led to the Rule's repeal can help explain the passion with which some scholars argue against allowing perpetual trusts to exist.[116]

A. The Common Law

For much of the past three centuries, debate over perpetual trusts has been a purely academic exercise. The Rule Against Perpetuities has, for over 400 years, limited the duration of future interests and thereby limited the duration of trusts.[117]

The Rule was first articulated in 1681 by Lord Nottingham in *The Duke of Norfolk's Case*.[118] In the centuries leading up to the case, the law of future interests was in a state of constant flux. Beginning in 1285, landowners could hold their property in fee tail, which made the land forever inalienable by locking it into a single bloodline.[119] The fee tail proved to be quite popular and, with land being the primary productive resource of the time, it became highly inefficient for so much of it to be tied up within a small number of families rather than being sold to its most productive users. In addition, it became difficult to know for certain whether a given piece of property was held in fee simple or whether it might have once been conveyed in fee tail generations before.[120] In 1472, the courts stepped in and established the "common recovery," which allowed any current

tenant of a fee tail to convey their property in fee simple, which essentially retired the fee tail as a legal estate.

Between 1472 and *The Duke of Norfolk's Case* in 1681, wealthy landowners and their lawyers devised new ways to create future interests and the courts struggled to define consistent rules to govern them. Judges, themselves members of the landowning upper class, understood the desire to plan for the future of an estate beyond the next generation and to protect it from mismanagement or dissolution in the hands of an irresponsible heir. On the other hand, the past inconveniences of the fee tail loomed large in an agricultural society increasingly committed to free alienation of property. The judges were in agreement that the "perpetuities" enabled by the fee tail imposed social costs and should be avoided. But as applied to contingent remainder interests and to interests in trust, it was unclear what constituted a "perpetuity."

In *The Duke of Norfolk's* case, the future interest at issue was seen by many judges as a step too far towards what they conceived of as a perpetuity. Lord Nottingham disagreed, and in his opinion he laid the foundation for what would become the Rule Against Perpetuities. Contrary to conventional wisdom, the rule announced in *The Duke of Norfolk's* case did not represent a new restraint on future interests, but instead expanded their reach relative to the status quo in the seventeenth century.

B. Twentieth Century Reform

By the twentieth century, the dust around the law of future interests had mostly settled. Since 1681, nearly 200 years of common law decisions had carved out a distinct Rule Against Perpetuities, even if you had to squint to make out its contours.[121] John Chipman Gray famously distilled those decisions into a concise yet deceptively complex Rule: "*No interest is good unless*

it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[122]

The calculus of the common law Rule is difficult and arcane.[123] By the 1950s it had earned a reputation as a trap for the unwary practitioner and a headache for 1L Property law students. The common law Rule is also incredibly harsh: it voids any contingent future interest that *might possibly* vest beyond the perpetuities period. This feature made the Rule overbroad in absurd ways.[124] Professor W. Barton Leach led a movement to reform the Rule under the doctrine of "wait-and-see." Rather than immediately subjecting each interest created in trust to the Rule Against Perpetuities, Leach's proposed reform would wait for a prescribed period of time and only then see if the interest had actually vested.

For a technical disagreement over the proper mechanics of a centuries-old limit on the vesting of future interests, these early debates over reform of the Rule became intense to the point of being described as a "holy war."[125] Opposite Leach was Professor Lewis Simes, who worried that any reform of the Rule would lead down a slippery slope back to perpetuities. The battle over wait-and-see outlasted both Leach and Simes. After Leach's death, his colleague A. James Casner took up the mantle of Rule Against Perpetuities reform within the American Law Institute (ALI). When Casner was appointed to be the reporter for the Restatement Second of Property (Donative Transfers), Professor Richard Powell, the reporter for the Restatement First, came out of retirement to debate Casner.[126] Ultimately, Casner prevailed in a series of heated debates at the 1978 and 1979 ALI Annual Meetings—in what has been referred to as the "Battle of the Titans"—and the Restatement Second adopted the wait-and-see doctrine.[127]

After wait-and-see reform was approved by the ALI, the Uniform Law Commissioners (ULC) began work on a Uniform Statutory Rule Against Perpetuities (USRAP). The Reporter for the

USRAP, Professor Lawrence Waggoner, advocated a technical change to the ALI's wait-and-see rule which would convert it from a doctrine based on "measuring lives" to a simpler ninety-year period.[128]

This seemingly innocuous change, eventually reflected in the USRAP, sparked the "Perpetuities Wars of the Late Twentieth Century."[129] Opposing Professor Waggoner was Professor Jesse Dukeminier. Dukeminier argued that by enshrining an explicit ninety-year period in new statutes, the USRAP would make the period salient to financial planners and thus result in the use of more long-term trusts.[130] Both Waggoner and Dukeminier seemed to agree that dead hand control should be constrained, but they disagreed about the precise means by which the Rule should limit it.[131]

C. GST-Driven Reform

In the same year that the USRAP was promulgated, Congress introduced a reformed GST tax. Under the new scheme, if a testator transfers up to the maximum GST exemption amount (which at the time was equal to $1 million and today has increased to over $11.5 million per person), no transfer taxes will ever be incurred on future distributions from the trust. While Waggoner and Dukeminier battled over the USRAP in a barrage of fiery law review articles, a market for perpetual trusts had been sparked by the new GST.[132] South Dakota led the way, having previously abolished its Rule in 1983. Delaware repealed its own Rule in 1995, Alaska followed in 1997, and by 2011 more than half of the states had repealed the Rule either functionally or completely.[133]

Where the twentieth century reform movement was top-down and directed by law professors, the repeal movement is bottom-up and has been led by bankers.[134] The competition to attract trust business is fierce. Trade magazines publish rankings for trust situses much like US News publishes

rankings for law schools.[135] A spot in the top tier can net billions in new trust business and lucrative commissions. The trust industry, with its trillions of dollars in assets under administration, has successfully lobbied state legislatures across the country to allow perpetuities.

In the meantime, Professor Waggoner and the ALI have continued to work on reforming the Rule. The Third Restatement, promulgated in 2010, proposes a new version of the Rule that replaces the ninety-year wait-and-see period with a requirement that the trust terminate at the death of all beneficiaries who are more than two generations younger than the testator. The Rule of the Third Restatement may be viewed as a compromise, or perhaps a negotiated truce in the face of a greater, existential threat.[136] These reforms seem unlikely to be adopted, as the momentum favors repeal. As of 2020, 34 states have repealed the Rule and none has reinstated it. The four-hundred-year-old Rule Against Perpetuities, along with nearly a century of legal reform work, has been rendered obsolete. Perpetual trusts are here to stay.

CONCLUSION

Professors Dukeminier and Simes were right: The Rule Against Perpetuities, with all its infuriating intricacies and flaws, proved to be a unique and fickle protector against the impulse to exert dead hand control. Tinkering with it may have broken the spell. By embracing a simple ninety-year period, the USRAP demystified the common law Rule and allowed policymakers to imagine the possibility of even longer periods.[137] When the enactment of the GST provided a financial incentive for collective action by the banking industry, state legislatures competed for trust business and responded by repealing the Rule entirely.[138] The result has been a clear and significant increase in the creation of perpetual trusts, primarily in the form of Dynasty Trusts.[139]

The proliferation of Dynasty Trusts, in combination with weak federal transfer taxes, represents a windfall for the wealthiest Americans and poses a threat to our economy and our

democracy. And the involvement of banking groups in the legislative process might suggest a distasteful kind of interest capture.[140] It's no surprise that in a floor vote at its 2010 Annual Meeting, the ALI unanimously expressed its disapproval of perpetual trusts,[141] and that Professor Waggoner continues to advocate for states to undo their repeals and implement the Third Restatement's new instantiation of the Rule.[142]

In this essay, I have argued that the category of perpetual trusts is expansive and frequently conflated with the Dynasty Trust. The target of the ALI's ire seems to be the Dynasty Trust in particular, but the Rule Against Perpetuities applies broadly to all trusts. Previously, new types of trusts that required perpetuity could only achieve it through statutory exemption. Private Foundations and Stewardship Trusts were each granted perpetuity by legislatures. Now that perpetual trusts are accessible to all, new types, such as the Ancestor Trust, are bound to emerge.

Some types of perpetual trusts, such as Dynasty Trusts, may in fact be ill-advised. If a particular type of perpetual trust generates negative externalities, imposing a tax is the best solution. If the administration of perpetual trusts ends up causing inconvenience as time passes, existing doctrines of trust modification provide courts with a way out. Modern technology allows for perpetual trusts to be administered without incurring enormous cost or inconvenience. And perpetual trusts created today no longer hold land, which previously required a rule designed to ensure alienability. The Rule Against Perpetuities is an anachronistic instrument that today creates more harm than it prevents. With its repeal, modern trusts have been freed from the dead hand of the past.

* * *

[1] Lewis M. Simes, Public Policy and the Dead Hand (Ann Arbor: University of Michigan Law School, 1955), 111. (“By [the charitable trust], the vanity of the dead capitalist may shape the use of property forever.”)

[2]Lawrence W. Waggoner, *From Here to Eternity: The Folly of Perpetual Trusts*, Univ. of Mich. L. Sch. Pub. L. & Legal Theory Working Paper Series No. 529, Dec. 2011, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1975117.

[3] Lucy A. Marsh, The Demise of Dynasty Trusts: Returning the Wealth to the Family, 5 EST. PLAN. & CMTY. PROP. L.J. 23, 50 (2012-2013). (“Does that not, in itself, demonstrate the foolishness of Dynasty Trusts? Not to a true believer.”)

[4] Mark L. Ascher, But I Thought the Earth Belonged to the Living, 1157 (2010).

[5] Bridget J. Crawford, Who Is Afraid of Perpetual Trusts, 111 Mich. L. Rev. First Impressions 79, 79 (2012).

[6] Eric Rakowski, The Future Reach of the Disembodied Will, 4 Politics, Philosophy & Economics 91, 91 (2005).

[7] As Austin Scott wrote, "the purposes for which we can create trusts are as unlimited as our imagination."

[8] F. W. Maitland, Maitland: State, Trust and Corporation, 155 (2003).

[9] Ray D. Madoff, Immortality and the Law: The Rising Power of the American Dead, 80 (2010). Professor Madoff quotes Raymond Young warning Congress in his 1984 testimony:

> “We are obliged to point out to you that if [the 1986 GST tax] is adopted . . . , it will be an inducement to generation-skipping. You will have more generation-skipping than you ever had under pre-1976 law, and there will be a greater erosion of the tax base, because you will have the banks, lawyers, financial planners, and all others saying, here you are, this is a specially created opportunity for you. Congress has said you can take $1 million, put it aside, no generation-skipping tax.”

[10] Waggoner, The Folly of Perpetual Trusts, *supra* note 2, at 2-3. (“When Congress enacted the GST tax, it probably assumed that most states would continue to adhere to the Rule against Perpetuities in one or another variation. . . .”)

[11] Madoff, *supra* note 9, at 82.

[12] Laura E. Cunningham, Remember the Alamo: The IRS Needs Ammunition to Fight Against FLPs, Tax Notes, March 13, 2000.

[13] Adam J. Hirsch, Bequests for Purposes: A Unified Theory, 56 Wash. Lee Law Rev. 33, 36 (1999).

[14] *Id.*

[15] Madoff, *supra* note 9, at 101.

[16] Joshua Getzler, Frederic William Maitland-trust and corporation, 35 U. Queensland LJ 171, 185 (2016)

[17] *Id.*, at 188.

> “But if the asset-holding form of the [unincorporated association] was doctrinally ludicrous, the practical results were striking. England knew a private associational law where corporate forms could be woven out of co-ownership, contract and trust, without the State as the source of public order being called in to grant the concession of incorporation. Thus groups could attain agency, in the broad philosophical sense of a capacity to act rationally and legally as a unified entity, and also self-government, or the autonomous power to broker and settle internal conflict, building with the normal institutions of private law, using State enforcement only where necessary to maintain the building blocks of ownership, contract and trust. The associational urges of the citizenry could thus emerge beyond political State license; the attainment of group identity and personality was not wholly in the gift of the State."

[18] Maitland, *supra* note 8, at 102.

[19] *Id.*

[20] Madoff, *supra* note 9, at 92.

[21] Shenandoah Valley Nat'l Bank v. Taylor, 63 S.E.2d 786,790 (Va. 1951).

[22] Madoff, *supra* note 9, at 92.

[23] *Id.*, at 111. (“Private foundations receive almost half of all charitable bequests.”)

[24] *Id.*, at 101.

[25] *Id.,* at 102.

[26] *Id.*

[27] *Id.,* at 104.

[28] *Id.,* at 108.

[29] Bridget Crawford, *supra* note 5, at 81.

[30] RESTATEMENT OF TRUSTS *§* 368(f) (1935) The *Restatement* defines charitable to mean “purposes the

accomplishment of which is beneficial to the community."; Hirsch, Bequests for Purposes, *supra* note 13, at 45, fn 44. ("The section adds a nonexclusive list of illustrations: trusts for the relief of poverty, for the advancement of education, for the advancement of religion, for the promotion of health, and for governmental purposes. The definition found in the Restatement is modelled after the British Statutes of Charitable Uses.")

[31] Hirsch, Bequests for Purposes, *supra* note 13, at 45. Superstitious trusts were those that promoted "false religious practices."

[32] *Id.*, at 70-1. ("Where the bequest in question is a perverse reflection of the traditional bequest for a social purpose—to wit, a bequest for an antisocial purpose, one that would cause injury to others or to society in general,—the resulting social costs weigh against the benefit to the testator in making the bequest.")

[33] *Id.* ("But did any space lie in between these antipodes? Such a notion may have come less naturally to legal thinkers, and in fact the possibility that a trust for a purpose might be neither charitable nor superstitious did not dawn early on the English courts. Testators tended to follow familiar channels…").

[34] *Id.*, at 51-2. ("On the one hand, a testator may…seek to benefit those who come after her - just as when she bequeaths directly to persons - but still may wish to stipulate the uses to which her estate is devoted. Bequests for purposes that the law deems charitable fall into this category, but so do others not so acknowledged. When a testator [does so], she decrees that her resources go to survivors, but only to subsidize a fixed variety of consumption - one that lawmakers fail to accept as generating public benefits.").

[35] *Id.*, at 46.

[36] *Id.*

[37] UNIF. TRUST CODE §§ 408, 409.

[38] Susan N. Gary, The Oregon Stewardship Trust: A New Type of Purpose Trust that Enables Steward-Ownership of a Business, 88 Univ. Cincinnati Law Rev. 707, 717 (2019).

[39] *Id.*

[40] *Id.*

[41] *Id.*, at 719.

[42] *Id.*, at 711.

[43] *Id.*, at 707.

[44] *Id.*, at 721-2. ("[T]he South Dakota statutes provide for court direction if the purpose becomes 'impossible, inexpedient, or unlawful[;]' state that the trust enforcer is a fiduciary; provide for compensation for the enforcer unless the trust agreement provides otherwise; create a process for removal of an enforcer; and provide that no filings, reports, or accountings are required for a purpose trust unless a court requires them.")

[45] H.B. 2598, 80th Leg. Assemb., Reg. Sess. § 2(1) (Or. 2019).

[46] Gary, *supra* note 38, at 725-8.

[47] *Id.,* at 728.

[48] *Id.*, at 729.

[49]The Purpose Foundation, Steward-Ownership: Rethinking ownership in the 21st century (2018), https://purpose-economy.org/content/uploads/purposebooklet_en.pdf.

[50] Kevin E. Davis, Contracts as technology, 88 NYUL Rev. 83, 85 (2013). Like a new type of contract, a new type of trust is a form of technological progress.

[51] Hirsch, Bequests for Purposes, *supra* note 13, at 37.

[52] Adam J. Hirsch, Freedom of Testation/Freedom of Contract, 95 Minn. Law Rev. 2180, 2252 (2010).

[53] Margaret Jane Radin, Property and Personhood, 34 Stanford Law Review 957, 959-61, 978-79, 986-88 (1982); Margaret Jane Radin, The Colin Ruagh Thomas O'Fallon Memorial Lecture on Reconsidering Personhood, 74 Oregon Law Rev. 423, 426 (1995).

[54] Deborah S. Gordon, Mor[t]ality and Identity: Wills, Narratives, and Cherished Possessions, 28 Yale JL & Human. 265, 268 (2016).

[55] Carolyn Folkman Curasi, Linda L. Price & Eric J. Arnould, Understanding the intergenerational transmission of cherished possessions: Insights for estate planning, trust officers and other end-of-life professionals, 7 Journal of Financial Services Marketing 369, 371 (2003).

[56] *Id.* ("[R]eceiving an item from a deceased loved one often provides strong symbolic meanings for survivors. Further, informants reveal that being selected as the recipient of a parent's or grandparent's cherished possession is very meaningful. Some survivors reported that receiving these special possessions provided them with a psychic income, which proved to be as valuable as real property for some informants.").

[57] David R. Unruh, Death and personal history: Strategies of identity preservation, 30 Soc. Probl. 340, 341 (1983).

[58] *Id.*, at 343. ("Auctions and antique stores are full of unwanted objects stripped of the cherished meanings they once held (Taylor, 1981). However, if survivors know the "stories" behind an acquired object and the meaning it once

had for the deceased, reminiscences will be formed and organized around that knowledge."); Gordon, *supra* note 54, at 314.

[59] Gordon, *supra* note 54, at 310.

[60] Lawrence W. Waggoner, Curtailing Dead-Hand Control: The American Law Institute Declares the Perpetual-Trust Movement Ill Advised, 8 (2010), https://papers.ssrn.com/abstract=1614934.

[61] Gordon, *supra* note 54, at 267.

[62] *Id.*, at 315.

[63] Scholars have categorized arguments against perpetual trusts in various ways. Dukeminier and Krier identify the categories of inalienability, first-generation monopoly, and duration. *See* Jesse Dukeminier & James E. Krier, The Rise of the Perpetual Trust, 50 UCLA Law Rev. 1303, 1319 (2002). Gallanis identifies categories of economical and philosophical arguments. T. P. Gallanis, The Rule Against Perpetuities and the Law Commission's Flawed Philosophy*,* 59 Cambridge L.J. 284, 284-85 (2000)

[64] Kent D Schenkel, Exposing the Hocus Pocus of Trusts, 45 Akron Law Review 63, 68-70 (2012).

[65] *Id.*, at 70. ("Take, for example, the spendthrift clause. The sole purpose of fitting a trust with a spendthrift clause is to jettison the cost of debt-exposure so that it falls on those outside the trust deal.")

[66] Robert H. Sitkoff, The Lurking Rule Against Accumulations of Income, 100 Nw. UL Rev. 501, 515 (2006).

[67] Eric Kades, Of Piketty and Perpetuities: Dynastic Wealth in the Twenty-First Century (and Beyond), 60 BCL Rev. 145, 190 (2019). ("If policymakers are solely concerned about alienability, the RAP is overkill. Simply requiring grantors to (i) place all property they wish to divide between present and future interest holders into a trust, and (ii) give the trustee full power to sell all assets, suffices to insure the power and the incentives to sell assets to highest-value users.")

[68] Adam J. Hirsch & William K. S. Wang, A Qualitative Theory of the Dead Hand, 68 Ind. LJ 1, 17 (1992).

[69] John H. Langbein, Because Property Became Contract: Understanding the American Nonprobate Revolution.

[70] Sitkoff, *supra* note 66, at 515-16. Sitkoff suggests that to the extent accumulation of income in trusts represents a risk today, the answer lies "in narrow constructions of uneconomic instructions, robust application of the principle that a private trust must be for the benefit of the beneficiary, and judicially approved deviation from administrative provisions." Inefficient restraints on alienation can be altered under the same doctrines.

[71] Waggoner, Curtailing Dead-Hand Control, *supra* note 60, at 8. ("As a perpetual trust drifts deeper and deeper into its second century and beyond, and long after the settlor and the attorney responsible for proposing and drafting the trust have passed away, administrative and other costs in keeping up with births, adoptions, deaths, marriages, and so on will act as a drag on investment performance.")

[72] Crawford, *supra* note 5, at 84. ("Some trusts with few beneficiaries require a great deal of administrative time; other trusts with a large number of beneficiaries require minimal administrative time.")

[73] Michael Vincent, Computer-managed Perpetual Trusts, 51 Jurimetrics 399 (2011).

[74] Crawford, *supra* note 5, at 84. ("Each prospective trustee should have the freedom to make an independent business decision about taking on the ad- ministration of a perpetual (or other) trust.")

[75] John H. Langbein, Mandatory Rules in the Law of Trusts, 98 NW. U. L. REV. 1105, 1110 (2004); Henry Hansmann & Ugo Mattei, The Functions of Trust Law: A Comparative Legal and Economic Analysis, 73 NYUL Rev. 434, 465 n.89 (1998).

[76] Hirsch, Freedom of Testation/Freedom of Contract, *supra* note 52, at 2244.

[77] Susan F. French, Perpetual Trusts, Conservation Servitudes, and the Problem of the Future, 27 Cardozo Law Rev. 2523 (2005). ("Another similarity between private trusts and conservation servitudes is that they are always or frequently created by gift, with an explicit direction by the donor that they are to last in perpetuity. That they are created by gift raises the question, critically important in thinking about the problem of the future, of how much deference is due to the donor's stated intent.")

[78] *Id.*

[79] Hirsch, Freedom of Testation/Freedom of Contract, *supra* note 52, at 2241.

[80] *Id.*, at 2242; UNIF. TRUST CODE § 412(a) (amended 2005), 7C U.L.A. 507 (2006); RESTATEMENT (THIRD) OF TRUSTS § 66(1) & cmt. a (2003).

[81] Hansmann & Mattei, The Functions of Trust Law, *supra* note 75, at 465 n.89.

[82] Kades, *supra* note 67, at 150.

[83] *Id.*, at 156.

[84] *Id.*

[85] *Id.*, at 168 ("The key point is that with r at 5%, it is relatively easy for wealth growth to exceed descendant growth. If once a generation (twenty-five years) each descendant has two children, the set of descendants grows at about 2.8% a year averaged over time. With an r of 5%, a dynasty trust can handily accommodate the growing brood

of beneficiaries.")

[86] *Id.*, at 186.

[87] *Id*. ("Under these parameters, a donor can assure all of her descendants, forever, a very comfortable annual income of $200,000 by investing about $14.8 million dollars in a dynasty trust…. Someone dying with an estate of $75 million could fund $1 million-dollar annual incomes for all of her (expanding) set of descendants over an infinite horizon. Finally, to consider an extreme example, Bill Gates, with reported wealth of about $81 billion, could create a dynasty trust that would assure each of his growing tree of descendants over $2 billion a year.")

[88] *Id.,* at 199.

[89] *Id.*, at 198.

[90] *Id.*, at 197.

[91] *Id.*, at 150. ("Perpetuities, then, pose multiple real threats to future generations' welfare. This Article, however, does not advocate reinstating the RAP. The RAP is an absolutist and blunt instrument that is too inflexible to adequately address the negative consequences of perpetuities that I identified.... This Article…advocates employing the first and best tool for combatting negative externalities: taxes calibrated to the harm caused by each external cost."); Crawford, *supra* note 5, at 87. ("To curb perpetual trusts, make them subject to the GST.")

[92] Steven J. Horowitz & Robert H. Sitkoff, Unconstitutional Perpetual Trusts, 67 Vanderbilt Law Rev. 1769, 1788 (2014).

[93] *Id.,* at 1789.

[94] *Id.*, at 1791.

[95] *Id.*, at 1797.

[96] *Id.*, at 1798.

[97] Carol M. Rose, Introduction: Property and Language, or, the Ghost of the Fifth Panel, 18 Yale JL & Human. 1, 26-7 (2006).

[98] Madoff, *supra* note 9, at 82.

[99] Shelly Kreiczer-Levy, Inheritance Legal Systems and the Intergenerational Bond, 46 Real Property, Trust and Estate Law Journal 495, 499 (2012).

[100] *Id.*, at 501.

[101] *Id.*, at 505. ("These two interests are interdependent and complementary. The giver passes on the property in the hope of creating a sense of obligation in the receiver - the obligation to cherish, remember, and respect. In this way the giver can influence the world after her demise by allocating the property and thus affecting the receiver's life. The gift reaffirms the receiver's position with the giver. Also, the receiver gets the chance to give new content to the gift. The receiver uses the property and through her use makes it her own, but without belying the original meaning of the property. It is a shared project. The intergenerational bond project cannot be realized one-sidedly; it requires cooperation.")

[102] Gregory S. Alexander, Intergenerational Communities, 8 Law Ethics Hum. Rights 21 (2014).

[103] Waggoner, The Folly of Perpetual Trusts, *supra* note 2, at 19. ("I ask for the third time, this time in a slightly different way: If the foregoing projections and other concerns had been before them, would the state legislators still have been convinced that it is good public policy to authorize perpetual trusts, and would the wealthy still have been convinced that the tax advantages are worth putting them in place?")

[104] *Id.*, at 5.

[105] *Id.,* at 9.

[106] The popularity of genealogical tools such as Ancestry.com demonstrates the importance that many people place on making connections with distant ancestors.

[107] John V. Orth, Escaping the Malthusian Trap: Dynasty Trusts for Serious Dynasts, 17 Green Bag 2d 29, 31 (2013).

[108] Orth, Escaping the Malthusian Trap, *supra* note 107, at 33. (""True dynasts were focused on maintaining the status of the family in perpetuity, not on the perpetual well-being of each and every family member.")

[109] Thomas P. Gallanis, The Future of Future Interests, 60 Wash. Lee Law Rev. 513, 557 n.296 (2003). ("For the record, I retain my previously-stated agnosticism."); Susan F. French, Perpetuities: Three Essays in Honor of My Father, 65 Wash Law Rev. 323, 351 (1990). ("In sum, I find it very difficult to feel certain either that more dead hand control is a bad thing or that it is a good thing. I envy those who are confident that we will be better or worse off if we permit 90-year trusts-I am not at all sure.")

[110] John H. Langbein, The Contractarian Basis of the Law of Trusts, 105 Yale Law J. 625, 627 (1995). ("In truth, the trust is a deal, a bargain about how the trust assets are to be managed and distributed.... [T]he deal between settlor and trustee is functionally indistinguishable from the modern third-party-beneficiary contract. Trusts are contracts.")

[111] W. Barton Leach, Perpetuities in a Nutshell, 51 Harv. Law Rev. 638, 660 (1937). ("It is no objection to the

enforceability of a contract that the liability thereunder does not accrue until a time beyond the period of perpetuities. Thus insurance and suretyship contracts (both contingent obligations) are valid without reference to the time when the contingency may occur or payment may be required.")

[112] Hirsch, Freedom of Testation/Freedom of Contract, *supra* note 52, at 2183-4.

[113] *Id.*, at 2187. ("Gratuitous transfers obviously benefit recipients, but they simultaneously gratify a benefactor, whose happiness depends on theirs. . . . Although benefactors cannot share in a beneficiary's utility from an inheritance at the time of its receipt, they can envision it, and derive present utility from its anticipation.)

[114] Richard A. Epstein, Past and Future: The Temporal Dimension in the Law of Property, 64 Wash. ULQ 667, 694 (1986).

[115] W. Barton Leach, Case and Text on the Law of Wills 203 (2d ed. 1951).

[116] Robert H. Sitkoff, The Lurking Rule Against Accumulations of Income, 100 Nw. UL Rev. 501, 501 (2006).

[117] The one historical exception has been for charitable trusts, which have long been exempted from the Rule and granted perpetual existence.

[118] 3 Ch. Gas. 1, 22 Eng. Rep. 931 (1681).

[119] Statute *De Donis Conditionalibus*, 13 Edw., ch. 1 (1285).

[120] George L. Haskins, Inconvenience and the Rule for Perpetuities, 48 Mo. L. rev. 451, 461 (1983).

[121] W. Barton Leach, Perpetuities: The Nutshell Revisited, 78 Harv. Law Rev. 973, 983 (1965).

[122] Leach, Perpetuities in a Nutshell, *supra* note 111, at 639.

[123] Haskins footnote 2 ("At the same time, the fiendishly difficult calculus of the rule is a matter of legend; Dean Gulliver captured the feelings of many when he remarked that the word 'vest' as used in perpetuities analysis 'has a rare capacity for engendering other four-letter words.'")

[124] *See generally* Leach, Perpetuities in a Nutshell, *supra* note 111.

[125] Dukeminier & Krier, *supra* note 63, at 1306.

[126] French, Three Essays: *supra* note 109, at 332 n.21. ("It is interesting to remember that Professor Powell brought Professor Casner into the American Law Institute in 1935 to work as an associate reporter for the *First Restatement* while Casner was still a graduate student at Columbia.")

[127] *Id.*

[128] *Id.*, at 332-3.

[129] *Id.*, at 348.

[130] *Id.*, at 334.

[131] *Id.*, at 350. ("All of the participants in the current Perpetuities Wars seem to accept, almost without discussion, the ideas that dead hand control is bad and that lives in being plus 21 years imposes a suitable limit on its reach.")

[132] Max M. Schanzenbach & Robert H. Sitkoff, Perpetuities or Taxes-Explaining the Rise of the Perpetual Trust, 27 Cardozo Law Rev. 2465, 2274 (2005).

[133] Kades, *supra* note 67, at 178.

[134] Robert Sitkoff, Top-down Versus Bottom-up Law Reform in Trusts and Estates: Future Interests and Perpetuities, Jotwell: J. Things We Like 240 (2010). ("The currency of the top-down reforms is prestige. . . . [T]he currency of bottom-up reforms is politics.")

[135] Daniel G. Worthington, Mark Merric, Ryan L. Thomas, & John E. Sullivan III, Which Trust Situs is Best in 2020?, 159 Trusts and Estates 70 (2020).

[136] Sitkoff, Top-down Versus Bottom-up, *supra* note 134. ("The new rule of trust duration is meant is to honor the purpose the ancient rule against remote vesting as a prophylactic against the problem of changed circumstances, but in a form that is simpler and yet still self-explanatory of the rule's underlying policy.").

[137] Mary Louise Fellows, Why the Generation-Skipping Transfer Tax Sparked Perpetual Trusts, 27 Cardozo Law Rev. 2511, 2519 (2005). ("USRAP itself became a part of the dry tinder on which the GST tax fell to spark perpetual trusts.")

[138] Schanzenbach & Sitkoff, *supra* note 132, at 2468.

[139] *Id.*

[140] Crawford, *supra* note 5, at 85.

[141] Lawrence W. Waggoner, Curtailing Dead-Hand Control: The American Law Institute Declares the Perpetual-Trust Movement Ill Advised (2010)

[142] Lawrence W. Waggoner, Congress Promotes Perpetual Trusts: Why? (Univ. of Mich. L. & Econ. Res. Paper Series, Paper No. 13-015, 2016), https://ssrn.com/abstract=2326524