A UNIFORM PERPETUITIES REFORM ACT

*Scott Andrew Shepard**

For centuries the Rule Against Perpetuities provided protection against a pair of dangers: that important stocks of property would become, effectively, permanently inalienable as a result of perpetual conditional gifts; and that the dead would be permitted to control the destinies of the living by placing permanent conditions on the fixed stock of available wealth (i.e., land wealth). In recent decades, though, the states have increasingly abandoned the Rule and its protections. As of 2011 all states have migrated, at least in part, beyond the traditional "twenty-one-years-plus-life-in-being" rule, and more than half have actually or effectively abolished their rules, at least insofar as applied to grants made in trust form.

This migration is, in the main, quite sensible. The traditional Rule was complicated, hard to apply, inefficient, and unsupple. Even the ninety-year wait-and-see variation, which has come mostly to supplant the traditional Rule, cannot differentiate between wise and beneficent gifts that should survive beyond the ninety-year threshold and problematic gifts that should not. The danger of inalienability can be dealt with by transmuting legal interests into equitable interests at some date certain, and by granting trustees of those equitable interests the power of alienation as a matter of law as of the same date. The dangers of dead-hand control have already largely dissipated because wealth is not primarily, today, held in the form of a limited and social-and-political-power-soaked stock such as land, but rather in a variety of highly mutable forms, none of which carries with it overarching political or social overtones. Remaining concerns about the small category of problematic dead-hand incentives can be resolved by targeted adjustments to well-established aspects of property and trust law that carry none of the disadvantages of the Rule Against Perpetuities in any of its forms.

In short, then, the states have no good reason to revive their Rules Against Perpetuities, and it should not be imagined that they will. Abolition of those Rules does, however, raise some few legitimate concerns about alienability and dead-hand incentives, concerns best and most efficiently

* Assistant Professor, John Marshall Law School, Chicago, Illinois. The author would like to thank Jamie Sommer of the JMLS library and his intrepid research assistant Emily Davis for their invaluable contributions to this paper. Any errors of fact, thought, or locution, of course, must be attributed solely to the author. This article does not address some of the more granular details attendant to this proposal, including, for example, exactly how many years conditional grants should be permitted to exist before they convert into equitable grants. Such details are obviously amenable to a range of acceptable conclusions. The author would be grateful if readers would share with him any thoughts they may have about the optimum resolution of these issues, and about any other portions of this article.

resolved by a few careful amendments to state trust and property law. This article proposes and explains a Uniform Perpetuities Reform Act with which Rule-abolishing states can make these targeted changes.

Introduction

Has the rule against perpetuities served its purpose—and does it deserve a well-earned, but long-in-coming, retirement? A significant and increasing number of states have decided that it has and it does.[1] More than half of the states have abolished their rules against perpetuities in whole or in part, and the others have taken up the ninety-year wait-and-see approach of the Uniform Statutory Rule Against Perpetuities (USRAP).[2] As of 2011, no state clings entirely to the traditional twenty-one-years-plus-life-in-being rule[3] that has furrowed the brows and haunted the nightmares of tens of thousands of first-year law students for generations.

These developments hearten students and please many practitioners, but they concern the American Law Institute (ALI). Navigating athwart the abolitionist wave, the ALI decried the states' efforts and instead adopted in its *Third Restatement of Property* a brand new rule against perpetuities, a rule nowhere in effect.[4] This new rule would require conditional gifts to end (i.e., would require full ownership to vest) at the death of the last grantee born two generations after the grantor.[5] The ALI clearly hopes that this new rule against perpetuities will catch on, and will reverse the tide flowing toward abolition.[6]

---

1. *See infra* notes 26–30 and accompanying text (summarizing the perpetuities rules that are in effect in each state).

2. The traditional Rule Against Perpetuities, at least as it has been understood since the late nineteenth century, declared that "[n]o interest is good unless it must vest, if at all, no later than twenty-one years after some life in being at the creation of the interest." *See, e.g.*, WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 3.17 (3d. ed. 2000) (citing JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES (1886) (articulating concretely and for the first time the traditional rule as a fixed construction rather than as a constellation of rules based on a shared premise)). Under this traditional rule the determination of whether the interest succeeded or failed was made on the basis of whether it was possible, *at the time of the interest's creation*, that the interest might not vest. *Id.* If non-vesting were possible, the interest failed. *See id.* The USRAP, in contrast, establishes a ninety-year "wait-and-see" period: instead of trying to determine whether an interest could fail to vest during the (twenty-one-years-plus-life-in-being) vesting period, the USRAP permits the interest to survive for ninety years. If, after the end of that ninety-year period, some interests remain unvested, the USRAP permits a court to apply the *cy pres* doctrine to reform the interest so that it will then vest. *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES §§ 1, 3 (1990) [hereinafter USRAP]; STOEBUCK & WHITMAN, *supra*, at § 3.22. The USRAP does not apply to options, gifts to charities, or governments. *See* USRAP, *supra*, at § 4. It has been incorporated into the Uniform Probate Code. *See* UNIF. PROBATE CODE §§ 2-901 to -906 (2010); STOEBUCK & WHITMAN, *supra*, at § 3.22.

3. *See* sources cited *infra* notes 26–30.

4. *See generally* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS ch. 27 (2010) [hereinafter RESTATEMENT (THIRD)] (Rule Against Perpetuities).

5. *See id.* ch. 27.1.

6. *See id.* ch. 27, at 576.

I have my doubts. In fact, as I have argued extensively elsewhere,[7] I think the ALI's project, and its proposal, to be both unwise and fairly hopeless.

The project of reviving the rule against perpetuities in anything like its classic form is unwise because the rule against perpetuities no longer suits the needs of contemporary property law or of modern society generally. The rule was devised to respond to then-real, pressing issues of inalienability and dead-hand control that afflicted the England of the early modern period.[8] There, land was the primary source of wealth, and also the primary source of political power and social prestige.[9] Those without land stood largely beyond the pale. No more land could be created, of course.[10] In other words, the store of *important* wealth was largely fixed.[11] Meanwhile, the long-term conditional grants—i.e., the perpetuities—that land owners created tended to take

---

7. *See generally* Scott Andrew Shepard, *Which the Deader Hand? A Counter to the American Law Institute's Proposed Revival of Dying Perpetuities Rules*, 86 TULANE L. REV. 559 (2012).

8. *See, e.g.*, A.W.B. SIMPSON, LEADING CASES IN THE COMMON LAW 76 (1995) (asserting that the rule against perpetuities' "function was to impose limits which seemed reasonable in the world to the degree to which the head of the family, the patriarch for some time being, could make binding dispositions of the family estates which controlled their destination long into the future"); *see also* RESTATEMENT (SECOND) PROP.: DONATIVE TRANSFERS, intro. note at 8–10 (1983); RESTATEMENT OF PROP., intro. note at 2129–33 (1944).

9. *See, e.g.*, Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1320 (2003) ("In the early years of the Rule against Perpetuities, future interests were usually in land, then the chief form of wealth in England . . . ."); 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, 27–28 ("Land was the basis of economic subsistence, wealth, family solidarity, social status and above all security. . . . Apparently, so much of the land in England had been tied up in entails of this sort that it became unsafe to take a conveyance lest one lose it" as the result of an ancient and undiscovered entail.).

10. One might argue that English colonization in the new world effectively "created" additional land, but these new lands carried none of the political and few of the social benefits of land in the British Isles. There was, mercifully, no such thing as a Duchy of Virginia. As a store of wealth, colonial tracts also largely failed, given the massively greater value of land on the home island than in the colonies. *Compare* Robert C. Allen, *The Price of Freehold Land and the Interest Rate in the Seventeenth and Eighteenth Centuries*, 41 ECON. HIST. REV. 33, 43 (1988) (noting that British farm land was valued at roughly ten shillings per acre in 1700), *with* James T. Lemon & Gary B. Nash, *The Distribution of Wealth in Eighteenth-Century America: A Century of Change in Chester County, Pennsylvania, 1693–1802*, 2 J. SOC. HIST. 1, 12 (1968) (noting that Pennsylvania farm land was worth roughly four tenths of a shilling per acre in 1689).

11. *See* Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 17 (1992) (explaining that the argument against dead-hand control had more power prior to the industrial revolution, when ownership of land still served as the store of the vast majority of wealth).

the form not of trusts, but of strings of life estates[12] or defeasible fees.[13] This meant that a failure aggressively to delimit perpetuities would have resulted in a fixed and immutable stock of wealth descending in accordance with the wishes of the long dead, who could thereby genuinely control the destinies of their descendants for generations unborn.[14] It would have resulted as well in a collapse of capital markets and perhaps too a fairly complete inhibition of progress, as the conditions attached to the grants made the land—and therefore the primary store of the wealth of the nation—functionally inalienable.[15]

The situation today is entirely contrary. Most property today is not held in land, but in the form of non-real estate assets.[16] These assets are not of fixed quantity; rather, wealth can be and is created and destroyed constantly.[17] And no form of property carries with it any particular political or social cache.[18] When conditional grants of

---

12. *See, e.g.*, Stoebuck & Whitman, *supra* note 2, § 2.11 ("[Life estates are] estates with a duration measured by the life of a designated person or the survivor of a group of persons. . . . Under modern American statutes prescribing, in substance, that every conveyance shall be deemed to convey the entire estate of the grantor unless a contrary intent is manifested, the owner of a fee simple estate can create a life estate only by an instrument clearly indicating the intent to create a life estate rather than to transfer the fee simple, although no particular form of words is required.") (footnote omitted). A life estate would arise, for instance, if a grantor were to transfer Blackacre "to A for his life, but upon A's death, Blackacre shall pass to B."

13. *See id.* § 3.7 ("The Property Restatement asserts that vested remainders 'so created as to be capable of expiration before the interests including a prior right to a present interest end'"—i.e., before all prior interests created by the transfer terminate—should be classified as "remainders subject to complete defeasance.") (citing Restatement (Second) of Prop. § 157 cmt. p). A defeasible fee thus arises if a grantor transfers Blackacre "to A, but if the land should ever be used as a tavern, to B." These interests could be carried into the far future by rendering B's (and, by implication, B's heirs) interests conditional as well, and then repeating the process for C and beyond.

14. *See infra* text accompanying note 60.

15. *See infra* text accompanying note 60.

16. *See, e.g.*, John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 Mich. L. Rev. 722, 723 (1988) ("Into the eighteenth century, land was the dominant form of wealth. The technological forces that broke up older family-centered modes of economic organization called forth two new forms of private-sector wealth. One category is what we today call *financial assets*—that is, stocks, bonds, bank deposits, mutual fund shares, insurance contracts, and the like—which now comprise the dominant form of wealth. The other great form of modern wealth is what the economists call *human capital.* It is the skills and knowledge that lie at the root of advanced technological life.").

17. *See, e.g.*, Hirsch & Wang, *supra* note 11, at 18 ("[I]n modern times, when each generation can produce its own wealth, the loss of opportunity to bequeath *prior* wealth does not clearly crowd later comers to their overall detriment.").

18. This is not an assertion that having more property does not, in at least some senses and in some contexts, carry with it more social cache, and more opportunities to participate in the political process, than having less property. On the other hand,

modern property occur, they tend to come in the form of trusts, complete with trustees who are authorized to alienate any specific pieces of property.[19] In other words, while remnants remain of the concerns that drove and required the rule against perpetuities in early modern England, they are mere flickering shadows of their former selves.[20] Straitening dead-hand control has devolved into perhaps irksome, though very often beneficent and wise, dead-hand incentive. The economy- and progress-hobbling threat of immutable inalienability has softened into the desire that trustees, at some point in their tenure, be assured a power of alienation. The student-soul-destroying, wealth-creator-choice-constraining, practitioner-baffling absolutism of the rule against perpetuities presents a far more blunt, crude, heavy, and ungainly weapon than is necessary to defend against these desiccated wraiths.

The ALI's specific proposal—of a new generation-based rule against perpetuities—is likely fairly hopeless; it is unlikely that the states, perhaps any states at all, will adopt it. For decades, *all* of the movement in the states has been toward weakening and rationalizing, and then abolishing, the rule against perpetuities.[21] There has been no impetus whatever toward making the rule against perpetuities stronger

---

ownership of a certain piece of property does not, as in seventeenth century Britain, carry with it special political power (as would have been the case for, say, the Duke of Norfolk, who thereby automatically gained a seat in the House of Lords and political power within his duchy). Nor must potential voters demonstrate ownership of a certain minimum quantity of *land* property in order to exercise the suffrage. And while the proposition is fairly unamenable to proof, it seems consonant with general observation that no one much cares whether one's friend's families are landed gentry instead of holding their property in the form of equities.

19. *See, e.g.*, UNIF. TRUST CODE § 815(a)(2)(A) (2003) ("A trustee, without authorization by the court, may exercise . . . except as limited by the terms of the trust . . . all powers over the trust property which an unmarried competent owner has over individually owned property."). A trustee's powers include the power to "acquire or sell property, for cash or on credit, at public or private sale," *id.* § 816(2), and, with regard to real property, to "construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries," *id.* § 816(8); Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1027 (2009) ("With the exceptions of leases, mortgages, and options to purchase land, future interests are not commonly used in land transfers today in the United States, although they are still common in trusts of personal property.").

20. *See infra* Part II.C.3 (considering why concerns about dead-hand control have been greatly mitigated by economic and social change in the centuries since the rule against perpetuities emerged).

21. *See infra* Part II.A (recounting that movement away from the traditional rule and, in many cases, toward partial or complete abolition).

or more complex. While it could be argued that the ALI's two-generations rule is less complex than the traditional rule against perpetuities, the argument is irrelevant, since the traditional rule is essentially dead. It cannot reasonably be argued that the ALI's new formulation is simpler than the ninety-year wait-and-see rule, which was the clear modern-trend rule before the abolition wave swept through. The ALI thus finds itself in the position of asking the states completely to countermand their abolitionist impulses, and instead to adopt a new, complex rule against perpetuities that states have neither tried nor seen before. Add to this the fact that the two-generations rule will have the practical effect of shortening the perpetuities period[22] and the result is clear: the ALI's proposed new rule against perpetuities will not be adopted.

For all of these reasons, I propose in this article the adoption of a Uniform Perpetuities Reform Act (UPRA or the Act), a model of which appears below. UPRA would resolve the misplaced stringency of the traditional rule or its USRAP successor while providing a more modern and realistic solution to contemporary concerns than does the ALI's approach.

The first function of the Act is to revoke the current rule against perpetuities in those states that maintain some form of it. The Act would, therefore, unlike the traditional rule against perpetuities or its more modern incarnations, not set automatic and immutable sunsets on conditional grants regardless of the form of the grant, the type of property implicated, the powers of those charged with administering the grant, or the nature of the conditions attached.[23] On the other hand, it *would* establish some—far more nuanced and non-invasive—rules to govern perpetuities. These rules are designed to address the actual, limited concerns which modern perpetuities genuinely raise. Second, the Act would require that conditional grants not initially established in trust form be converted into trusts either immediately or after some fixed period (perhaps ninety years), and that trustees responsible for the administration of conditional gifts enjoy the power to alienate any of the property that is the subject of the grant after that same period.

Third, it would require trustees to modify trust terms when the costs of administering the trust grow larger than some threshold percentage of the trust's total value. The purpose of this modification would be to continue to work so much of the grantor's intent as possible while both bringing the administrative costs under the designated

22. *See* Shepard, *supra* note 7, at 611–13.

23. *See supra* note 2 and accompanying text (describing and comparing the traditional rule and the USRAP); *see also infra* notes 26–30 and accompanying text (summarizing the current state rules).

threshold level and setting those costs on a trajectory to remain under the threshold level into the foreseeable future. Fourth, the Act would establish it as a rule of trust interpretation that class designations or other terms of art employed by the grantor in establishing the trust be read according to the usages in place at the time of each distribution from the trust—rather than fixing in amber the definitions in place at the time the grant is established—unless some substantive provision of the trust would be violated by using the contemporary definitions. Finally, the Act would create an opportunity for state legislatures to identify gift conditions they consider noxious on public policy grounds, and would instruct judges to strike such noxious conditions immediately—not ninety years or two generations down the road.

In Part I of this article I provide the language of my proposed uniform Act, including alternative language in order to present additional policy options. (I have not burdened the reader with a definitions section, though one might ultimately prove necessary; all of the terms I employ in this proposed Act take their standard definitions.) The burden of the discussion appears in Part II; it is there that I defend broadly my determination that the time for an "automatic," or any sort of aggressive, rule against perpetuities has passed. I also demonstrate that the legitimate concerns that might drive a party to continue to embrace a rule against perpetuities can be dealt with more efficiently and effectively in a vehicle more supple and modern than a perpetuities rule. Part II also reviews those characteristics of the *Restatement (Third)* approach that I think will make that approach particularly unattractive to the states, and suggests why I think my proposal more fit for the purpose—both as a rule that every state should adopt, and particularly as a uniform rule that actually has some chance of creating uniformity. In Part III, I explain and defend each substantive section of my proposed Act. (The non-substantive sections of the Act are lifted, more or less verbatim, from the USRAP, the comments to which fully explain those provisions.[24]) Finally, Part IV revisits the proposal of the *Restatement (Third)* and I argue that any attempt to achieve uniformity across the states must pass over the ALI's proposal in favor of a more modern scheme.

24. *See generally* USRAP, *supra* note 2. The relevant provisions of UPRA are §§ 9–11, and correspond to USRAP §§ 5, 7 and 8.

I.
Proposed Uniform Perpetuities Reform Act[25]

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Perpetuities Reform Act.

SECTION 2. REPEAL. This [act] supersedes the rule against perpetuities [the Uniform Statutory Rule Against Perpetuities] as enacted at [list statutory provisions to be repealed].

SECTION 3. VALIDITY OF PROPERTY INTERESTS.

(a) No property interest shall be invalid because it remains unvested for any period of time after its creation.
(b) No power of appointment shall be invalid because it remains unexercised, or because it may still be exercised, for any period of time after its creation.

SECTION 4. UNVESTED LEGAL PROPERTY INTERESTS.

(a) Unvested legal property interests shall be converted into equitable property interests [*not more than ninety years after the creation of the interest*].
(b) When such unvested legal property interests are converted into equitable property interests, the court shall assign a trustee to administer the equitable property interests, unless other provision has been made in the instruments that established the unvested legal property interest.

SECTION 5. TRUSTEE'S POWER TO ALIENATE. The trustee of unvested equitable property interests may exercise, without regard to any terms of the instrument creating the unvested property interests, the power to alienate the property subject to those interests:

(a) Not more than ninety years after the creation of the unvested equitable property interest; or
(b) Immediately upon the conversion of unvested legal property interests into unvested equitable property interests per § 4.

[*Alternative: SECTION 5. TRUSTEE'S POWER TO ALIENATE. The trustee of unvested equitable property interests may exercise the power to alienate the property subject to those interests at any time, without regard to any terms of the instrument creating the unvested property interests.*]

25. The proposed Act will hereinafter be referred to as UPRA.

SECTION 6. RULE OF ADMINISTRATIVE EFFICIENCY.

(a) Absent explicit terms to the contrary, a trustee must on his own initiative *[petition the court to]* modify the administrative or dispositive terms of an instrument creating equitable property interests or powers of appointment if modification is required to allow the trustee to continue to administer the instrument without total administrative expenses exceeding [___] percent of the total value of the property subject to the trustee's administration. The modification must be made so as to continue to do so much of the purposes of the original instrument as remains practicable consistent with the obligation to bring total administrative expenses under this threshold and set those expenses on a course to remain under the threshold into the foreseeable future.

(b) If the trustee [*the court*] cannot modify the terms of the instrument in accordance with this section, the trustee [*the court*] will modify the instrument to terminate any equitable property interests or powers of appointment, distributing the property subject to the trustee's administration in the manner most consistent with the purposes of the instrument.

[*(c) Any beneficiary of an equitable property interest or other beneficiary under the instrument modified may petition the court to review any unilateral modification action taken by the trustee in accordance with this section.*]

SECTION 7. ANTI-STALENESS PRESUMPTION. Absent explicit terms to the contrary, all class-gift designations or other general or group-minded beneficiary-designation terms employed in an instrument creating equitable property interests or powers of appointment shall be interpreted in accordance with definitions and usages common at the time of each distribution under the instrument, rather than those common at the time the instrument becomes effective.

[*Alternative: SECTION 7. ANTI-STALENESS PRESUMPTION. It is presumed that all class-gift designations or other general or group-minded beneficiary-designation terms employed in an instrument creating equitable property interests or powers of appointment should be interpreted in accordance with definitions and usages common at the time of each distribution under the instrument, rather than those common at the time the instrument becomes effective. This presumption may be overridden only by the inclusion of an express substantive provision in the instrument that would be contravened by employing the definitions and usages common at the time of each distribution. Standard language to the effect that "terms shall be interpreted according* *to definitions and usages common at the time this instrument becomes effective" will have no effect.*]

SECTION 8. NON-ENFORCEMENT OF NOXIOUS CONDITIONS.

(a) The trustee will not honor, nor the courts enforce, the following conditions, on the grounds that these conditions violate public policy:

[to be specified by the legislatures. Such provisions might include conditions that deter marriage; conditions that distinguish on the basis of the race, creed, adoptive status or other characteristics of potential beneficiaries and/or relations of beneficiaries; conditions that unduly limit creditors' rights; or other conditions the legislature deems to violate public policy.]

(b) The conditions listed in part (a) of this section will *[will not]* constitute the exclusive enumeration of conditions that will not be honored as violative of public policy.

(c) Upon the striking of any condition under this section, the instrument will be modified to do so much of the purposes of the original instrument as remains practicable in the absence of the stricken conditions.

SECTION 9. APPLICATION.

(a) Except as extended by subsection (b), this [act] applies to nonvested and equitable property interests or powers of appointment created on or after the effective date of this [act]. For purposes of this section, a property interest or power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(b) If an interest otherwise subject to this [act] was created before the effective date of this [act] and is determined in a judicial proceeding, commenced on or after the effective date of this [act], to violate this State's rule against perpetuities as that rule existed before the effective date of this [act], a court upon the petition of an interested person may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the property interest or power of appointment was created.

SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION. This [act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [act] among the states enacting it.

SECTION 11. EFFECTIVE DATE. This [act] takes effect [_________].

II.
Abolishing the Rule

Sections 2 and 3 of the proposed Act would abolish the rule against perpetuities. This Part offers argument in favor of doing so.

A. The States Have Spoken

Many states have already moved toward abolishing the rule against perpetuities. As of 2011 *every* state has abandoned—at least in part—the traditional, twenty-one-years-plus-life-in-being rule, Alabama having been the last holdout.[26] Thirty states shifted, at one time or another, to the USRAP,[27] whether *in toto* or as modified.[28] Many of those USRAP states, however, along with other states that never adopted the USRAP, have moved on to abolish their rules entirely, or to extend their wait-and-see periods to effectively perpetual lengths, at least as they apply to property held in trust.[29] These states now constitute a majority.[30] No states have moved in the other direction—the direction of *strengthening* their rules or shortening perpetuities periods.

What has motivated the states to act? It is, of course, notoriously difficult—or blatantly fictitious—to ascribe unitary motives to the ac-

26. *See* 2011 Ala. Acts 532; Lynn Foster, *Fifty-One Flowers: Post-Perpetuities War Law and Arkansas's Adoption of USRAP*, 29 U. Ark. Little Rock L. Rev. 411, 411–13 (2007) (detailing the demise of the traditional rule in the remaining American jurisdictions); *see also Legislative Fact Sheet—Statutory Rule Against Perpetuities*, Unif. L. Comm'n, http://uniformlaws.org/LegislativeFactSheet.aspx?title=Statutory%20Rule%20Against%20Perpetuities [hereinafter *USRAP Fact Sheet*]. These citations represent the last-available nationwide surveys of RAP laws. There is no indication, however, of any state having moved back toward the traditional rule since 2007.

27. *See supra* note 2 and accompanying text (describing the content of the USRAP). In contrast to the USRAP and other iterations of the Rule, the UPRA would not automatically upset any conditional interests, recognizing that most of the conditions placed on such interests are either genuinely beneficent or at worst morally neutral. *See infra* Part III.D. For those few conditions which are, or become, objectionable violations of public policy, the UPRA enshrines the judicial power to reform or reject those conditions. *See* sources cited *supra* note 2; *see also supra* UPRA § 8.

28. *See USRAP Fact Sheet*, *supra* note 26.

29. *See* Foster, *supra* note 26, at 427–30 (detailing the perpetuities rules of the states as of 2007); *see also* Restatement (Third), *supra* note 4, ch. 27, at 548; Shepard, *supra* note 7, at 566–67; *Dynasty Trust States*, Law Offices of Oshins & Associates, LLC, http://www.oshins.com/dynastytruststates.html [hereinafter *Dynasty Trust States*] (listing 28 states plus the District of Columbia that have either significantly increased or entirely abolished their perpetuities periods for trusts).

30. *See Dynasty Trust States*, *supra* note 29.

tions of groups.[31] Nevertheless, it seems reasonable to speculate that legislatures chock-a-block with lawyers might jump at the chance to retire this convoluted rule. Lawyer-legislators may also have been prompted to this reform, as they have been in other arenas, by the fact that attorneys are increasingly held liable in malpractice for their failure correctly to apply byzantine old rules.[32] Mostly, though, it appears that these elected officials have been impelled to migrate away from the traditional rule, through the USRAP and toward abolition, from the most predictable of motives: the desire to satisfy their constituents. Property owners have sought additional flexibility in planning their estates and disposing of their property,[33] and the states have, to varying degrees but now with unanimity, provided it.

B. The ALI Overestimates the Stability of Federal Tax Law and Misapprehends the Function of Federalism

Out of these unremarkable developments the ALI has conjured villainy, and predicts catastrophe. First, the villainy. It accuses the states of acting from base motivations—specifically, from the base motivations of creating business for their constituents and saving them money, rather than closing a "loophole" that Congress has elected not to close, and in fact has regularly enlarged. The Tax Reform Act of 1986[34] included an exemption in the generation-skipping transfer tax (GST tax) that permitted grantors to pass up to $1 million to remote descendants exempt from the GST tax.[35] Later modifications of fed-

31. *Cf.* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

32. *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, 2100–01 (2003) ("Historically, will beneficiaries could not recover on malpractice claims because they were not in 'privity' with the lawyer who had botched the will. And because the estate itself had not been diminished in size by the drafting error, the executor could not recover as a representative of the non-deceased testator. As a result, the failure of a lawyer to understand the Rule Against Perpetuities bore no significant risk of liability for error . . . . As state after state abolished or liberalized the privity rule in the estate context, the Rule's complexity—and the potential for error—loomed as a potential source of lawyer liability.") (footnotes omitted).

33. *See, e.g.*, Joshua C. Tate, *Perpetual Trusts and the Settlor's Intent*, 53 KAN. L. REV. 595, 611–20 (2005) (reviewing the unsurprising settlor preference for additional latitude in trust formation and maintenance).

34. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (codified as amended in scattered sections of 26 U.S.C.).

35. *See* I.R.C. § 2631(a) (2006); RESTATEMENT (THIRD), *supra* note 4, ch. 27, at 554; *see also* BORRIS I. BITTKER & ELIAS CLARK, FEDERAL ESTATE AND GIFT TAXATION 20 (8th ed. 2000); Darien B. Jacobson, Brian G. Raub, & Barry W. Johnson, *The Estate Tax: Ninety Years and Counting*, STAT. OF INCOME BULL., Summer 2007, at 118, 124.

eral tax law regularly increased the exemption,[36] culminating in a complete exemption in 2010[37] before receding to $5 million, indexed to inflation, as a result of the December 2010 tax deal.[38]

The 1986 act, along with its later amendments, created an opportunity for the states. As the GST tax and its exemption were written, the longevity of trusts established to take advantage of the exemption—and thus of the advantages of the exemption—was limited only by state perpetuity rules.[39] Hence, states could maximize the tax-exemption opportunities for their citizens, or for citizens of other states who steered trust business into their states, by significantly elongating or entirely eliminating their perpetuities periods. Many states, of course, have done just that.[40]

This the ALI condemned, essentially accusing the states of failing to pay their federal taxes. It castigated the states for having "exhibited greater interest in generating trust business for in-state institutional trustees than in protecting the federal fisc,"[41] and suggested that the states had acted "contrary to longstanding federal tax policy."[42] These, though, are curious rebukes. It is unclear how the ALI divined a "longstanding federal tax policy" that the states have violated, given that the relevant exemplar of that tax policy is the very quarter-of-a-century-old GST tax-and-exemption system to which the states have responded. Nor did the ALI explain why the states should attend to some free-floating obligation to "protect the federal fisc" from the very policies and policy consequences established by the federal government itself. The federal government, girt fast in the armor of the Supremacy Clause, could of course craft a GST tax exemption that does not rely for its operation on state perpetuities laws; President Obama's original 2012 budget, since unanimously defeated in the

36. *See* Jacobson, Raub, & Johnson, *supra* note 35, at 124.

37. *Id.*

38. *See, e.g.*, Laura Saunders, *Tax Changes for 2011: A Checklist*, WALL ST. J., Jan. 8, 2011, at B7; Laura Saunders, *How Much Will Your Taxes Jump?*, WALL ST. J., Jan. 5, 2013, at B7 (confirming that the $5 million exemption, still indexed to inflation, was maintained, and made "permanent" by the December 31, 2012 so-called fiscal cliff deal).

39. *See* Dukeminier & Krier, *supra* note 9, at 1313 (citing I.R.C. § 2631(a) and I.R.C. § 2631(c)).

40. *See, e.g.*, RESTATEMENT (THIRD), *supra* note 4, ch. 27, at 562–63 (listing states that have extended their perpetuities periods from 360 to 1000 years; have allowed grantors to opt out of the rule against perpetuities; and have exempted trusts from perpetuities rules); Foster, *supra* note 26, at 420–25 (describing the state of play in 2007).

41. RESTATEMENT (THIRD), *supra* note 4, ch. 27, at 562.

42. *Id.*

Senate and withdrawn,[43] proposed exactly that.[44] The federal government has failed to make such a change for a quarter century, and will almost certainly hold fast to the current rules into the foreseeable future. It would seem, then, that longstanding federal tax policy in this area is to continue to rely on state perpetuities laws to contour the GST tax exemption, and would seem as well that the states' interest in creating tax saving and business opportunities for their citizens might warrant rather less of the ALI's obloquy.

C. *The ALI's Consequentialist Reasoning is Greatly Exaggerated*

Next, the catastrophes. The ALI predicts a collection of horrors to follow in the wake of abolition of state rules against perpetuities. First, if states were to continue to take advantage of the federal GST tax structure just considered to create perpetual exemptions, the resulting tax-exempt trusts "potentially . . . could, over time, lead to large concentrations of wealth within a relatively small number of family dynasties and financial institutions . . . ."[45] This concern, accepted *arguendo*, does not coherently counsel for the retention of state rules against perpetuities, but rather for modification of federal tax law. As has been noted, a federal government worried about the rise of super-rich family dynasties can amend the GST tax-and-exemption structure to limit the durability of the exemption, or otherwise amend federal estate-tax law. This would entirely deal with the problem, without any reference to state perpetuities rules.

State rules against perpetuities are simply irrelevant to the problem. To see why, consider the effect that a perpetuities rule—in whatever form—would have on concentrations of family wealth in a dynasty-motivated family in the absence of a federal estate tax. The rule would, of course, require that trusts be wound up at the end of the relevant perpetuities period. Once the trust is wound up, however, we can expect the *res* of the trust simply to be passed to the then-current beneficiaries, i.e., members of the "dynasty" family, either by explicit provision made by the settlor, or by the normal processes of trust law, under which the court would be bound to further the trust's dynasty-motivated purposes.[46] If we assume minimal competence on the part

---

43. S. Con. Res. 18, 112th Cong. (2011) (rejecting proposed budget unanimously by a vote of 97-0); *see also* Paul Kane, Amy Goldstein & Peter Wallsten, *GOP Sticks to Medicare Proposal*, WASH. POST, May 26, 2011, at A1.

44. *See* Laura Saunders, *Dynasty Trusts Under Attack*, WALL. ST. J., Mar. 5, 2011, at B9.

45. RESTATEMENT (THIRD), *supra* note 4, ch. 27, at 561.

46. *See* UNIF. TRUST CODE § 412(a) (2000) (allowing the court to modify or terminate the trust in order to further the purposes of the trust).

of the beneficiaries (or their attorneys and financial advisors), then we can expect them simply to redeposit that *res* in trusts indistinguishable from the trust just concluded—in no way diminishing the dynasty family's aggregate wealth. Only if we assume the distribution-beneficiaries to be spectacular incompetents or wastrels—only if they woefully misinvest the *res*, or blow it away in an unproductive cloud—can we hope that a rule against perpetuities can have any independent role in breaking up dynasty wealth.[47] Public policy and simple dignity, however, must forbid principled and strategic reliance on, much less encouragement of, such human frailties in order to achieve desired policy outcomes. This is especially true when entirely coherent and non-reprobate alternatives (here, the estate tax) are so readily available.

1. Outsized Dynasties Will Be Naturally Controlled

Next, the ALI worried that the perpetual trusts, if permitted, would rapidly spray out assets to an incoherently large number of beneficiaries. Focusing solely on its great bugaboo, dynasty trusts, it ruminated that "[o]n average, a transferor will have about 450 living descendants (who are beneficiaries of the trust) 150 years after the trust is created, over 7000 living beneficiaries 250 years after the trust is created, and about 114,500 living beneficiaries 350 years after the trust is created."[48] This result, it said, would "put the perpetual or near-perpetual trust on a collision course with core principles of trust administration."[49] Quite true. In fact, as the ALI semi-tacitly admits, this concern about trusts spraying funds to vast legions of beneficiaries was always a shadow of fancy, because current trust law already contemplates and regulates such eventualities, again without the assistance of a rule against perpetuities. The ALI acknowledged that its "worst case scenario," in which "the costs of administering a perpetual trust . . . become so large that they consume the trust, leaving nothing for the settlor's descendants," could not actually arise even under current trust law, because:

> [S]uch an outcome would render the trust capricious . . . . Long before reaching that point, the trustee of such a trust would be under a fiduciary obligation to petition the court to terminate the

47. Of course, if the imagined dynasty family does consist of such characters, it does not stand much chance of remaining a dynasty family for long, or of making much use of that status.

48. RESTATEMENT (THIRD), *supra* note 4, ch. 27, at 564 (footnote omitted); *see id.* ("A 1000-year trust created in 2010 could terminate in the year 3010 and have millions of beneficiaries.").

49. *Id.* at 558.

> trust to prevent such an outcome. In this sense, the perpetual trust is structurally illusory—it would self-destruct in the course of administration.[50]

This last statement is only partially true; this progression would have no effect on trusts not designed to pay out to a geometric progression of beneficiaries. It would, though, have exactly this limiting effect on the very family dynasty trusts about which the ALI is most concerned.

Note too a related anomaly: no dynasty trust, no matter how vast initially, is going to have much effect in keeping a passel of leisured descendants in diamonds and caviar for very long. Assume that the patriarch of a would-be dynasty family leaves a cool billion dollars in trust for the purpose. The trust is well- and appropriately-invested, and throws off three-percent real returns (i.e., post inflation, so that the billion dollars retains its value over the intervening centuries). Using the ALI's own figures, descendants 150 years after the creation of the trust will receive $66,666.67 a year in distributions—a nice amount to have, surely, but hardly the stuff with which the idle, jet-setting rich proceed to control the destiny of the world. A century later, each beneficiary will receive a paltry $4,285.71. Nor, though, could our would-be masters of the universe count even on these remissions, as the figures make no deduction for satisfaction of the nightmarish administrative expenses that the ALI also posits.

In short, then, neither super-rich family dynasties nor trust-eating dead-weight losses of administrative expense present valid reasons to oppose perpetuities repeal even in the absence of the perpetuities-reform Act proposed in this article. Nevertheless, because excessive administrative costs arising from an extensive and growing network of beneficiaries does present more of a concern in a world without a rule against perpetuities than with one, Section 6 of the proposed Act responds to the problem directly with a Rule of Administrative Efficiency, discussed fully below in Part IV of this article.

2. *Attenuated Settlor/Beneficiary Relationships Present No Concern*

Another of the ALI's concerns proves even less substantial. It worries about another result of perpetual trusts: that as the years and the generations roll on, the blood relationship between the settlor and

50. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS, (Tentative Draft No. 6, 2010), at 122 n.36 (citing RESTATEMENT (THIRD) OF TRUSTS § 27; UNIF. TRUST CODE § 404).

the beneficiary will grow ever-increasingly tenuous.[51] Like the previous concern, of course, this one again demonstrates the ALI's fascination with dynasty trusts. The ALI fails to recognize, though, that the key characteristic distinguishing so-called dynasty trusts from other types of trusts is the relationship between the settlor and the beneficiary. This means that the more tenuous the relationship between settlor and beneficiaries, the less "dynasty-like" the trust. And while the ALI never makes clear what it thinks *wrong* with trusts that spray disbursements to beneficiaries only tangentially related to the settlor (or, alternatively, not related at all), it can hardly be true that dynasty trusts are bad because they keep wealth concentrated within a specific bloodline, but also bad because they eventually spray out benefits to beneficiaries only notionally and tenuously members of the same family. Additionally, the ALI's own proposed perpetuities rule, like those of most states, would exempt charitable trusts from its limitations—trusts which are characterized, in large part, by the fact that they provide benefits to some subset of members of the public, rather than to family members. As the blood relationship between the settlor and the beneficiaries grows weaker, a private trust comes to that very extent more closely to resemble a charitable trust.

3. Dead-Hand Control is No Longer the Worry that it Was in 1650

Finally, the ALI worries that abolition of perpetuities rules will unacceptably exacerbate problems of dead-hand control.[52] A rule against perpetuities is necessary, it claims, because "the limit forces control of encumbered property to be shifted periodically to the living, free of restrictions imposed by the original transferor. The living can then use the property as they wish, including retransferring it into new trusts with up-to-date-provisions."[53]

It is certainly true that the problem of dead-hand control was one of the critical drivers of the development of perpetuities rules.[54] (The other, the problem of actual or functional inalienability of grants of *legal* property interests governed by long-term or perpetual conditions (e.g., land passed under a string of life estates or otherwise conditioned), is curiously downplayed by the ALI,[55] but addressed fully in

51. RESTATEMENT (THIRD), *supra* note 4, ch. 27, at 549.

52. *Id.* at 565–68.

53. *Id.* at 566 (footnotes omitted).

54. *See* sources cited *supra* note 8.

55. The ALI has long recognized the promotion of free alienability of land as a central historical purpose of the rule against perpetuities. *See* RESTATEMENT (SECOND)

Sections 4 and 5 of the proposed Act, and discussed below in Part III of this article.) And well it should have been. Dead-hand control represented a serious, profound problem in the centuries and circumstances in which the rule against perpetuities developed. England is a small island country, and its land had, long before the seventeenth century, been parceled out amongst competing royal, noble, and gentry families,[56] while descendants would have found it difficult indeed to "make more."[57] Moreover, the issue of who owned the land was fraught with high meaning: land not only represented the primary source of wealth in that age,[58] but the primary source of political power and social standing as well.[59] Without some mechanism for limiting would-be perpetual conditional grants, long-dead ancestors could effectively have controlled the future of their descendants and of the entire kingdom. Imagine an ancestor who bequeathed his lands to "the eldest male descendants of each generation who will keep the manor house in its current condition," or join the Anglican Church, or buy a commission in the Royal Navy, or fulfill some similar condition. It would matter little whether fulfilling such conditions actually suited the interests of the relevant descendant, or whether the conditions continued to make sense—economically, socially or otherwise. The choice would be either to fulfill the conditions and receive the land (and hence the only means of access to the elite stratum of English political and social society), or to forgo the conditions and lose the land (and the access). Few would have rejected the conditions and declined the land. Meanwhile, long-term or perpetual conditions

---

OF PROP.: DONATIVE TRANSFERS ch. 1, at 8–10 (1983); RESTATEMENT OF PROP. div. IV, pt. 1, at 2129–33 (1944). In the Third Restatement, however, the ALI has given short shrift to that long-standing recognition, arguing that "[l]egal historians have concluded, however, that promoting free alienability of land was not the original purpose of the Rule." RESTATEMENT (THIRD), *supra* note 4, ch. 27, at 549. The legal historian's work upon which this assertion lies, however, does not effectively support that proposition. *See* Shepard, *supra* note 7, at 584–85 (discussing the ALI's contention). At all events, though, it is certain that promotion of alienability of property was, throughout the vast extent of its history, a significant justification for the rule against perpetuities—and the fact that free alienability can now be achieved in more efficient ways serves as a significant factor against perpetuating the rule. *See infra* Part III.

56. *See, e.g.*, EDWARD AUGUSTUS FREEMAN, A SHORT HISTORY OF THE NORMAN CONQUEST OF ENGLAND 118–19 (3d ed., Clarendon Press 1901) (1880) (Following William's conquest, "[t]he laws might still be the same; but their working could not be the same, when the king was a stranger, and when all the greatest estates and offices had passed into the hands of strangers. By the end of William's reign there were very few Englishmen holding great estates; there was no English earl and only one English bishop.").

57. *See* Shepard, *supra* note 7.

58. *See* sources cited *supra* note 9.

59. *See* sources cited *supra* note 9.

would also have the effect of rendering the lands—and thus the wealth—subject to those conditions virtually inalienable and potentially unimprovable (given the doctrine of waste).[60] It is hard to imagine an England so thoroughly immobilized developing into the country that led, if it did not outright invent, the industrial revolution.[61]

The situation today is entirely changed. Land is no longer the primary store of wealth,[62] and the world economy has long since grown out of the notion that there exists any such thing as a fixed stock of wealth.[63] Fortunes are created and destroyed constantly, all without access to land or any other single capital asset. Nor is ownership of land or any other specific type of asset a necessary pre-requisite to social or political influence. As a result, what once presented a profound problem of dead-hand control represents now nothing more than the opportunity for property earners to effect what might best be described as dead-hand incentives, financial subsidies designed to make certain life decisions more attractive, but certainly not to require them. If, today, for example, an ancestor establishes a trust designed to disburse to those of the ancestor's descendants who, say, graduate from law school, then the ancestor has indeed created some incentive for her descendants to come to the bar. Those descendants who elect to pursue another career, though, do not find themselves locked out of polite salons or the halls of political power, nor do they see the only viable source of financial capital available to them whisked away. Rather they merely find themselves, like the rest of us, obliged to pay for their own graduate studies and to make their own fortunes. Certainly their lives are not made *worse* because they have one more incentive, one more option available to them.

The ALI seems to suggest at one point that the rule against perpetuities is necessary because, after some period of years, the benefi-

60. *See, e.g.*, STOEBUCK & WHITMAN, *supra* note 2, § 4.2. The authors explain that "the older English cases proceeded on the assumption that any substantial alteration of the land or the structures on it would be waste because the reversion or remainderman in fee simple was legally entitled, at the termination of all preceding less-than-fee simple estates, to have possession of the property in substantially the condition it was in when the fee simple was divided into successive estates." Note that this driver of the need for the rule against perpetuities has itself also been ameliorated: "there is now substantial American authority for the view that a life tenant or a tenant for a substantial number of years is privileged to make extensive alterations in, or to demolish and replace, structures in order to make a reasonable use of the property, provided such changes do not diminish the value of the reversion or the remainder." *Id.*

61. *See, e.g.*, JAN LUITEN VAN ZANDEN, THE LONG ROAD TO THE INDUSTRIAL REVOLUTION: THE EUROPEAN ECONOMY IN A GLOBAL PERSPECTIVE, 1000–1800, at 1 (2009).

62. *See* sources cited *supra* note 2.

63. *See, e.g.*, Hirsch & Wang, *supra* note 11.

ciaries somehow gain an affirmative right to revel in their ancestors' largesse free of the conditions those ancestors had imposed.[64] This claim, though, sits poorly aside the ALI's worries lest ancestors be permitted to create family dynasties of leisured descendants: surely the descendants will be able to shirk work and lap in luxury more completely if handed their ancestors' fortunes unconditioned than if they can access funds only upon achieving specified conditions. And it is difficult, in a world of non-fixed capital resources, to discern beneficiaries' moral claims to unconditioned access to grantors' fortunes, whether the grantors and beneficiaries be related or not. While it is not *necessarily* true that every trust settlor herself earned the wealth placed in trust, it is absolutely true that none of the beneficiaries earned that wealth. Why should some arbitrary set of beneficiaries, some arbitrary period after the death of the grantor, receive distribution of the *res* of the trust, against the wishes of the settlor and at the expense of latter-day beneficiaries who would otherwise have taken it per the settlor's wishes and subject to the conditions that the settlor had established?

It is neither wise nor productive unilaterally and automatically to terminate at some arbitrary point—as a rule against perpetuities is designed to—all or even most of these dead-hand incentives. The conditions that establish such incentives can be divided into two categories: principal-preserving conditions and gate-keeping conditions. Neither proves categorically problematic, or justifies retention of a rule against perpetuities.

D. A More Modern and Modest Scheme Can Protect Against Rare Stale or Offensive Settlor Conditions While Respecting the Vast, Beneficent Majority

1. Staleness is an Overstated Concern

In fact, there are no principled objections to be made to principal-preserving conditions. A principal-preserving condition is one that requires that the *res* of a trust be preserved, either absolutely (i.e., with the *real* value of the *res* being preserved against inflation) or nominally, so that it will remain to generate income to fund future distribu-

64. Restatement (Third), *supra* note 4, ch. 27, at 549 (arguing that the rule against perpetuities is necessary to achieve a "fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property they enjoy" (quoting Lewis M. Simes, Public Policy and the Dead Hand 118 (1955))).

tions.[65] The only way to mount an objection to such a condition would be to claim that some certain tranche of beneficiaries has some moral claim to the principal, the *res*, of a grant. As we have seen, though, beneficiaries have no such claim. They are not creditors. And likewise, as they had no right to demand that they be made beneficiaries *at all* (i.e., the grantor could have done anything else in the world with the principal of the grant of which they are beneficiaries), they can hardly claim that their status as conditional beneficiaries somehow bootstraps them up to a moral claim as *unconditional* beneficiaries. The only objection that can be raised, then, to principal-preserving conditions is not a principled objection, but a technical one: namely that ostensibly principal-preserving conditions are in fact principal-wasting provisions because the rules governing principal investment (typically by trustees) or the practices of those trustees are so poorly suited to the task. This objection was actually raised throughout the twentieth century as it became clear that the investment-list rules and the later prudent-man standard that governed trustee investment through the period resulted in exactly that sort of sub-standard, principal-wasting investment.[66] The appropriate response to such concerns, however, is not a rule against perpetuities; it is exactly the response that was made—development of more technically appropriate trustee-investment rules.[67]

This leaves only gate-keeping conditions. These conditions define the beneficiary class (i.e., who may take from a grant) and the conditions under which they may take. To build on a previous example, a grant "to those of my descendants who graduate from law school," thus includes a multi-faceted gate-keeping provision, limiting those who may take under the grant to those within a defined class of beneficiaries who fulfill a specific condition. All grants include some gate-keeping provisions, in that they are not general grants for anyone in the world to enjoy the benefits of the grant. It hence would make no sense to object to gate-keeping provisions generally, and no one actually does. Instead, the ALI argued that gate-keeping conditions become dangerously unstable or unjust over time. "[N]o perpetual or

65. For an introduction to the distinction between principal-preserving and gate-keeping conditions, see Shepard, *supra* note 7, at 592–95.

66. *See, e.g.*, Joel C. Dobris, *New Forms of Private Trusts for the Twenty-First Century—Principal and Income*, 31 REAL PROP. PROB. & TR. J. 1, 2–6 (1996) (detailing objections).

67. The improved rules, which rely on portfolio-wide calculations of appropriate risk gauged to the unique circumstances of individual trusts and beneficiaries, and to actual economic conditions, are embodied in the Uniform Prudent Investors Act. *See generally* UNIF. PRUDENT INVESTOR ACT (1994).

near-perpetual trust drafted today will be able to anticipate concepts of family and descent as they change and adjust over vast intervals in the future," it suggested.[68] For instance, "[n]o trust drafted in 1650 or earlier could have contained provisions anticipating the possibility of adopted children, children of assisted reproduction, or children born to a surrogate mother, much less second-parent adoptions or posthumously conceived children."[69] Because of this asserted failure of grantor omniscience, it argued, a rule against perpetuities designed to curtail conditional gifts at some arbitrary near-future date becomes necessary.

The ALI's conclusion, though, does not follow. It is probably true that the average trust settlor in 1650 failed to anticipate assisted reproduction or surrogacy—though not necessarily adoption, which had deep historical and continuing continental roots.[70] The failure of such prescience, though, cannot justify clinging to the rule against perpetuities. In most instances, a grantor will have given no thought whatever to changing definitions of family, or of other beneficiary classes. A settlor—in 1650 or 2011—who establishes a trust to spray income to "my descendants" has not thereby embarked upon a study of, or taken a stand with regard to, the miracles and challenges of reproductive technology. She has merely established a benefit for her descendants, however those descendants might eventually be defined. In her case, we can protect against the ALI's worries about changing definitions of beneficiary classes simply by employing an interpretive default—that beneficiary classes be defined using the definitions in place at the time of each distribution. This anti-staleness presumption is considered in detail below as a part of the proposed UPRA.[71]

2. *Noxiousness is Better Defended Against by a Less Formal Approach*

It is nearly as easy to protect against the settlor who includes a boilerplate provision in the grant documents to the effect that "beneficiary classes shall be determined using current definitions of class

68. RESTATEMENT (THIRD), *supra* note 4, ch. 27, at 567; *see also* Lawrence W. Waggoner, *Curtailing Dead-Hand Control: The American Law Institute Declares the Perpetual-Trust Movement Ill Advised* 8–13 (Univ. Mich. Pub. Law & Legal Theory Working Paper Series, Working Paper No. 199, 2010).

69. *See* RESTATEMENT (THIRD), *supra* note 4, ch. 27, at 567 (footnote omitted); *see also* Waggoner, *supra* note 68, at 11–12.

70. *See, e.g.*, Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 744–45 (1956); K.H. Waters, *The Second Dynasty of Rome*, PHOENIX, Autumn 1963, at 198, 198–99.

71. *See* discussion *infra* Part III.C.

terms." A stronger presumption than the one above would ignore such a provision unless the provision were specific. This stronger presumption turns the ALI's concern on its head. With the stronger presumption in place, the fact that a settlor cannot anticipate future changes in class definitions makes it impossible for the settlor to *thwart* the gradual redefinition of the beneficiary classes in concert with changing technological developments and social mores. To take the ALI's own example, consider a settlor establishing a trust in 1650 for the benefit of her "descendants." As the ALI suggested, it is unlikely that this settlor could have anticipated surrogacy or posthumous conception. This means, though, that the settlor would lack both the imagination and the language to exclude surrogate or posthumously conceived children from the definition of "descendant." At most, the trust documents might have included boilerplate requiring that then-current definitions be used for all terms in the document, regardless of when distributions might be made. Now, though, the strong presumption does its work, striking the boilerplate. As a result, because the settlor could never have imagined—much less explicitly excluded from beneficiary status—children born of posthumous conception or surrogacy, distributions made after the term "descendant" has been expanded to include such categories of progeny will go to those descendants as well. By contrast, a settlor of 1650 *could* have imagined (or read about) adoption, and would not have struggled to imagine a world in which adoptive children were treated as descendants. Thus, the settlor of 1650 could have included an explicit provision excluding adoptive children from the definition of descendants for purposes of the trust. If the settlor did, for whatever reason, explicitly exclude adopted children, however, then there is no obvious reason not to honor that explicit instruction—it hardly being the product of inadvertent staleness, or unexpected technological or social change—unless the instruction has grown so noxious by some future distribution date that no court could continue to enforce it (more about which in a moment).

There are some very good reasons to opt for these interpretive presumptions, and for the UPRA, rather than opting for a re-invigorated rule against perpetuities. First, many if not most conditions attached to grants represent a positive good (or at very least are morally neutral) and are generally preferable to just dumping principal on some random tranche of beneficiaries. Unsurprisingly, settlors are not generally motivated to attach perverse or destructive conditions to their grants. Settlors tend to establish gate-keeping conditions out of a desire to assist those close to them, and often those closest to them who are in some particular need of assistance or guidance.[72] Grants may be made available, for instance, to "those of my descendants who are unable to provide for themselves." The nobility of such a grant—and of such a condition—may hardly be questioned, and no greater good could be achieved by subjecting a grant so conditioned to a rule against perpetuities requiring disgorgement of the principal to non-needy beneficiaries after an arbitrary ninety years or two generations, thereby denying the funds to future generations of needy descendants. Similarly, settlors are often motivated to provide incentives for their beneficiaries to work hard, to make something of themselves. Hence they often employ conditions such as "for those of my descendants who graduate from law school," or conditions that otherwise pay to descendants who prove to be productive members of society.[73] These valuable conditions are of course entirely contravened if a rule against perpetuities requires unconditioned distribution of the *res* of a grant to some arbitrary generation of beneficiaries without regard to whether they have fulfilled the condition, and the mandatory wind-up also obliterates that incentive for generations who come after the *res* distribution. It might fairly be argued that some of these attractive conditions are not entirely noble. A law professor, for instance, who conditions his beneficence on the successful acquisition of a law degree might be said to have indulged his ego as much as his nobler instincts. Still, though, there's nothing *wrong* with such a condition, and no reason why the law professor's largesse should be redirected by a rule against perpetuities after some arbitrary period. Surely, again, the descendants who would benefit from the rule's action can make no moral claim recognized in Anglo-American law to unconditioned transfer.

Of course, this is not to say that settlors *never* establish conditions that society might consider noxious—either immediately, or as the years and centuries witness changes to technology or social mores. One potentially problematic condition that has arisen repeatedly over the decades is this: the settlor establishes a trust, with benefits to pay to those of his descendants who marry within the settlor's faith.[74]

---

72. *Cf.* Joshua C. Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 REAL PROP. PROB. & TR. J. 445, 445–62 & n.30 (2006) (recounting difficulties of direct determination of trust provisions, providing anecdotal evidence of provisions designed to encourage thrift, hard work, and other virtues among descendants perhaps otherwise inclined).

73. *See id.*

74. *See In re* Estate of Feinberg, 919 N.E.2d 888, 903 (Ill. 2009) (finding conditions of faith not a violation of public policy); *In re* Estate of Coleman, 317 A.2d 631, 635 (Pa. 1974) (finding conditions of faith for trustees in violation of public policy); Maddox v. Maddox, 52 Va. (11 Gratt.) 804, 818 (1854) (same); *see also* Shapira v. Union Nat'l Bank, 315 N.E.2d 825, 832 (Ohio Ct. Com. Pl. 1974) (same).

Courts have divided about whether and under what circumstances such a condition so violates public policy that it cannot be honored by the courts.[75] One wonders what the courts would do with a condition that required would-be beneficiaries to marry within the settlor's race rather than his creed. And one can imagine standards shifting as the centuries progress.

To clarify the point, consider the previous example of adopted children. As the ALI rightly noted, England in 1650 did not recognize adoption or adopted children, so that an express provision excluding adopted children would have been conceivable,[76] but unnecessary.[77] Today, on the other hand, adoption is recognized in all American jurisdictions, and adopted children are treated increasingly indistinguishably from biological children.[78] It is not difficult, then, to posit a court or a legislature[79] determining that the public policy in favor of treating adopted children exactly like biological children had grown so firm as to render contrary provisions noxious violations of that public policy, and therefore unenforceable. This would mean that a provision that would have seemed quite unnecessary in 1650, and entirely unobjectionable in 1850, might prove unenforceable by 2050.

The power at issue—to declare noxious conditions unenforceable—already exists, but is spelled out more definitely in the UPRA, as discussed below.[80] The effect of the power is to dissipate any concerns that might remain about whether settlors' conditions might grow increasingly noxious over time if not arbitrarily foreshortened by a rule against perpetuities. The answer, as has been seen, is that they might—though the introduction of the anti-staleness presumptions outlined above greatly diminishes the possibility. If such an eventuality should occur, though, then the right response is not to rely on the arbitrary mechanism of a rule against perpetuities to cut off all conditions, wiping out the mass of beneficent conditions to control the few

75. *See* sources cited *supra* note 74.

76. *See supra* note 69 and accompanying text.

77. It would have been conceivable because the well-read Briton of the period was surely *aware* of adoption, and so certainly could conceive of it and talk about it, but a prohibition against taking by adopted children would have been unnecessary because adoption was not then contemplated in English law.

78. *See, e.g.*, Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 148–54 (noting that all states recognize adoption; adopted child is intestate heir of adoptive parents in all states; stranger-to-the-adoption rule repudiated in most states).

79. *See supra* UPRA § 8 (written in the alternative either to permit or forbid judicial accretion to the list of noxious, and hence unenforceable, conditions); *see also* discussion *infra* Part III.D.

80. *See* discussion *infra* Part III.D.

noxious ones, but rather to refuse to enforce noxious conditions *when they are recognized to be noxious*, either immediately upon the execution of the grant or when changing mores and circumstances render a once-acceptable condition in an old grant violative of present public policy. Section 8 of the proposed UPRA contemplates this prohibition against noxious conditions.

3. The Rule Against Perpetuities and the ALI Proposal are Ill-Equipped to Respect Modern Testators

A final principled reason to prefer the UPRA over a revived rule against perpetuities is that of grantor freedom. The UPRA, as has been demonstrated, maximizes responsible grantor freedom by permitting the grantor's conditions, and the grantor's intent, to stand indefinitely so long as the conditions are not initially, or do not become, noxious. Interpretive rules are put in place to ensure that grantors do not carelessly or thoughtlessly inculcate in their conditions inessential social or technological facts in place at the time the grant is structured, but permit those grantors explicitly to include conditions that they have considered and care about, and permit those conditions to obtain indefinitely (again, unless they should grow noxious over time). Administrative rules ensure that foolish or ill-considered conditions will not result in a wasting away of the *res* of the grant. As it is regularly the case that the grantor of wealth produced that wealth, while never the case that the beneficiaries of the grant did, the law should favor the grantor's wishes and do the grantor's intent over any claims by beneficiaries to be free of those wishes and that intent. That conclusion is particularly powerful where, as here, grantor freedom has been channeled and (at the margin of noxiousness) constrained to ensure that maximum attention to the grantor's wishes will tend toward enlarged benefit to an increased pool of deserving beneficiaries.

The UPRA, employing nothing more than tools that already exist in the law of property and the law of trusts, provides all of the protections that are still required and that were once found in the rule against perpetuities. It does so, though, without the arbitrary violence to settlor intent of a rule against perpetuities, and with much more respect for the well-considered and beneficiary-ennobling conditions so frequently established by grantors. The states are right. It is time to abolish, not to re-invigorate, the rule.

III.
The Case for the UPRA

A. *Ensuring Against Inalienability*

Sections 4 and 5 of the UPRA would ensure that abolition of the rule against perpetuities does not result in withdrawing property from the productive economy by rendering it permanently inalienable. The fear of inalienability has always been one of the two primary motivating forces behind the rule against perpetuities.[81] If Blackacre were subject to an endless series of legal life estates, it might be rented (though under tenuous tenure), but could never be sold. Likewise, if Blackacre were subject to a series of executory interests, each triggered by, for example, the previous fee holder's failure to keep Blackacre under the plow, the ability of interest holders to make appropriate contemporary decisions about how best to make use of Blackacre would be severely limited.

Modern property and trust law has largely solved this problem. Substituting the equitable form—a trust—for the legal form of consecutive or contingent future interests adds to the equation a trustee who generally enjoys the power to alienate any individual piece of property in the corpus of the trust.[82] Section 5 of the UPRA merely requires that all trustees be granted the alienation power. Section 4 forecloses the possibility of perpetual, inalienable *legal* property interests by converting unvested legal property interests into equitable property interests, thereby installing a trustee and an alienation power.

Both sections 4 and 5 have been presented with alternative forms, varying the time at which conversion from legal to equitable form and mandatory alienability of the corpus begin. Two obvious possibilities present themselves. The first, following the English model,[83] effectively abolishes the unvested legal property interest by converting any attempt to create such a device immediately into the trust form.[84] Under this model the trustee would immediately enjoy power of alienation, regardless of any attempted provision to the contrary by the grantor. The second model tracks instead the ninety-year wait-and-see

81. *See supra* notes 8, 56 and accompanying text.
82. *See* sources cited *supra* note 19.
83. *E.g.*, Law of Property Act, 1925, 15 Geo. 5, c. 20, §§ 1(1), (3) (Eng.) ("The only estates in land which are capable of subsisting or of being conveyed or created *at law* are . . . [a]n estate in fee simple absolute in possession; [and] [a] term of years absolute. . . . All other estates, interests and charges in or over land take effect as equitable interests.") (emphasis added).
84. *Id.* § 1(3).

rule of the USRAP, still the model for many American states.[85] Under this formulation, grantors would be able, as they are now in USRAP states, to create an unvested legal interest, or to deny trustees of equitable interests the power of alienation, for ninety years. Hence, a grantor could ensure that the family farm remain unsold and in farm use (or, at least, not actively converted to any other use) for up to ninety years after the grant becomes operational. After those ninety years expire, however, all legal interests would automatically convert to equitable interests (the courts already being fully empowered to appoint a trustee in such circumstances).[86] The trustees of the resulting equitable interests (or the continuing trustees, if the grantor had established a trust initially but had denied the trustee the right of alienation) would enjoy full power of alienation.

The policy tradeoff between these two options is fairly clear. In the former, "English" model, alienability and flexibility are maximized, as are the elegance and cleanness of the proposal, but at the expense of decreasing respect for grantor intent. In the ninety-year model, attention to settlor intent remains as robust as it has traditionally been in American jurisdictions,[87] but this comes at the cost of adding a complicating epicycle to the workings of the proposed Act. States should be presented with both options, but given that the latter model represents a much smaller change from present American law than does the former, it seems likely that most states would prefer to adopt the ninety-year alternative.

B. Protecting Against Metastasizing Beneficiary Classes

Section 6 establishes a rule of administrative efficiency, designed to ensure that the property conditionally transferred by the grantor does not disappear in a cloud of administrative expense. As was discussed above, at least some long-term or potentially perpetual trusts—

85. *See* sources cited *supra* notes 26–30 (discussing states that have adopted and kept the USRAP).

86. *See, e.g.*, UNIF. TRUST CODE § 704(c)(3) (2004) ("A vacancy in the trusteeship of a noncharitable trust that is required to be filled must be filled in the following order of priority . . . (3) by a person appointed by the court.").

87. U.S. jurisdictions have long given much more weight to grantor intent than has their English counterpart. In England, for instance, all of the beneficiaries of a trust can effectively dissolve the trust by mutual agreement. In the United States, on the other hand, the settlor's intent will be honored even in the face of unanimous beneficiary agreement that a different disposition occur. The American rule is generally called the *Claflin* doctrine. *See* Claflin v. Claflin, 20 N.E. 454 (Mass. 1888); *see also* Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1226–27 (1985) (discussing the difference between the American and British approaches).

trusts that would have been terminated by a rule against perpetuities—present the concern that the beneficiaries of the long-term trust may, over time, become so numerous that the whole value of the trust would end up being spent in keeping track of the beneficiaries and otherwise undertaking the administration of the trust, rather than in paying out actual benefits for those beneficiaries.[88] The rule of administrative efficiency builds on existing provisions in the trust code to deal explicitly with this problem in a way that maximizes respect for settlor intent and beneficiary benefit.

The most obvious iteration of this problem would arise if a settlor were to establish a trust designed perpetually to pay out the annual income from the trust[89] to all of the settlor's descendants, while maintaining the principal to allow like income payments into the distant future. Assuming the average modern American family,[90] the grandmother settlor would have four grandchildren, eight great-grandchildren, and geometrically more descendants (and beneficiaries) as the generations proceed.

If permitted to proceed long enough, this structure would inevitably, eventually, result in a trust that disgorged essentially nothing to a massive number of beneficiaries, with all of the income of the trust being used in trust administration. Of course one would hope that a settlor would anticipate this eventuality and make privately-ordered provision for dealing with it in the trust documents themselves; and one would expect a competent trust attorney to counsel that such provisions be included. In the absence of settlor foresight and competent counsel, however, a problem could arise.

The rule of administrative efficiency proposed in UPRA creates an express mechanism to deal with that problem. It provides that when the costs of administering a trust in a given year exceed some threshold amount of the whole average value of that trust over the course of the year, the trustee is obliged to effect a revision of the administrative

---

88. *See* discussion *supra* Part II.C.1.

89. Or some modern equivalent, such as the portion of the whole value of the trust effectively designated as income in the unitrust form. *See, e.g.*, 20 PA. CONS. STAT. § 8105(d)(3) (2010) (designating four percent of the total value of the trust as "income"); *cf.* UNIF. PRINCIPAL AND INCOME ACT, 7B U.L.A. 8 (2000) (permitting trustees to make equitable adjustments between the categories of "principal" and "income" in order to permit investments that maximize total return, but not permitting the creation of a unitrust).

90. The total fertility rate of the United States (i.e., the average number of births per woman's life) was 2.01 in 2009. *See* Brady E. Hamilton, Joyce A. Martin & Stephanie J. Ventura, *Births: Preliminary Data for 2009*, NAT'L VITAL STAT. REP., Dec. 1, 2010, at 1, 3, *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59_03.pdf.

or dispositive terms of the trust.[91] The trustee's duty is to devise a modification of the trust terms that will (a) continue to do as much as possible of the settlor's intent, while (b) bringing administrative costs under the threshold level into the foreseeable future. If, of course, unforeseen events were to change the glide path, further modifications might be required.

This rule, and the results arising from it, will always to be more supple and flexible, and more responsive to settlor intent and to the reality of the lives and conditions of beneficiaries, than would be a rule against perpetuities. Even in the case of the poorly considered and poorly counseled metastasizing-descendant-pool trust considered above, the rule of administrative efficiency will create a better result for settlor and beneficiaries alike than would a rule against perpetuities. Under a rule against perpetuities, of course, the trust would be wound up upon reaching some arbitrary date, be it ninety years after the inauguration of the trust or the death of the last beneficiary born two generations after the settlor.[92] The arbitrary date is immutable; it cuts short the settlor's intent and winds up the trust without regard to whether continued administration remains entirely efficient. Meanwhile, before the arbitrary date arises, the trustee has no obligation to attend to a specific, identified threshold of efficient administration, but only to protect against the pointless continuation of extremely ill-judged grants.[93] Under the rule of administrative efficiency, on the other hand, trustees face more nuanced obligations on behalf of settlors and beneficiaries. Their obligation to keep administrative costs under the rule's threshold is continuous, so that if inefficient administration would arise before ninety years or two generations had passed, the trustee would be obliged to modify to achieve efficiency immediately. On the other hand, if administrative efficiency could still be achieved after the arbitrary date without modification of the trust terms, the settlor's intended purposes could continue unrevised into the future.

91. *See supra* UPRA § 6(a).

92. *See supra* note 2 (discussing ALI proposal and USRAP).

93. *Compare supra* UPRA § 6(a) (providing for modification of trust terms when administrative costs exceed specified percentage of the value of property under administration), *with* UNIF. TRUST CODE § 412(b) (permitting court modification of trust terms because of unanticipated circumstances). Of course, it might be argued that § 412(b) of the Uniform Trust Code already requires the trustee to intervene to modify trusts just as rigorously as the rule of administrative efficiency would. Such an argument is really, though, an admission that so long as some provision exists for eventually converting unvested legal interests into equitable interests, *see supra* note 86 and accompanying text; *see also supra* UPRA § 4, any plausible rule against perpetuities has *already* been superseded by more efficient and vital alternatives.

Any number of individual-family vagaries could drive this diversity of result. Perhaps the descendants all elect to live in the environs of the family homestead, so that administration of the trust can continue straight-forwardly and inexpensively for many generations without depletion of the *res* of the trust. Perhaps, on the other hand, the settlor's descendants spread themselves to the four winds, so that administration under the specific terms of the trust comes rather quickly to exceed reasonableness. Even more permutations arise if the size of the family is no longer held constant. Positing a smaller family with fewer offspring results in fewer descendants of the settlor, and less and delayed pressure for modification. A larger family would have the opposite result. The rule of administrative efficiency can deal supplely with all of these eventualities. And when the time for individuated winding up does arrive under the rule, it continues to provide more flexibility than the rule against perpetuities, allowing, for instance, disbursement of payments to then-present recipients over some period of years rather than a lump-sum division of the *res* upon some arbitrary date certain.

The foregoing are the improved results of the rule of administrative efficiency over the rule against perpetuities when the former is applied to perhaps the paradigm case of careless trust formation: the perpetual, unbounded dynasty trust that inexplicably makes no provision for the obvious possibility that families grow and move over time. In any other circumstances—in the administration of any other variety of less-faulty trust—the benefits of the rule of administrative efficiency become even starker. Imagine, for instance, that the settlor establishes a principal-preserving trust that could again run for centuries, but this time establishes the trust with a preference for those descendants who are incapable of providing for themselves. Under this better-considered (because not so likely eventually to suffer from a fairly obvious administrative problem) trust, the trustee could continue to share the income of the trust amongst *all* beneficiaries until the number of self-sufficient beneficiaries grows too large. He then could modify the trust so that the payments (and the trustee's administrative efforts) were reserved to the favored takers. Were the trust to continue long enough, the trustee might have to take additional measures, securing modifications that would, for instance, distinguish between types of need; or requiring that potentially eligible recipients maintain contact with the trustee's offices, thus limiting the trustee's expenses in tracking down potential beneficiaries.[94] And, eventually, the pool of beneficiaries might still grow so large that the only appropriate option would be to wind up the trust, paying out the principal to some final tranche of needy takers. On the other hand, though, a family with (for whatever reason) fewer descendants incapable of taking care of themselves would present fewer charges to the trust, thus allowing the trust potentially to serve a valuable function essentially forever. Either way, though, it is difficult to see how any of these outcomes fails to present an objectively better result than winding up the trust after a couple of generations and paying out the principal of the trust to all descendants without regard to need.[95]

Two technical issues remain unresolved in this section of the UPRA; insights and suggestions would be greatly appreciated. The first issue is this: whether the trustee should be permitted, in the absence of express permission from the grantor to do so, to modify the trust on the trustee's own initiative (subject to court review should a beneficiary or would-be beneficiary lodge objection with the court), or if instead the trustee should be obliged to petition the court for modification when the need to modify has been triggered. The second technical question is at what level the maximum-administrative-expense threshold should be set. Modern trust-theory developments[96] support the conclusion that the threshold should be determined as a fraction of

94. Such modifications would have to be sought or undertaken consistent with the obligation that trustees will "continue to do so much of the purposes of the original instrument as remains practicable consistent with the obligation to bring total administrative expenses under" the relevant threshold and set them on a course to remain so. *See supra* UPRA § 6(a).

95. Similarly, by way of a slightly less noble example, posit again the trust designed to pay out income to those of the settlor's descendants who graduate from law school. Depending on how many descendants avail themselves of this incentive, the trust might require modification fairly quickly, or might last a very long time indeed. While sending descendants to law school might not be quite as virtuous as providing for one's needy posterity, there seems little reason to cut short the settlor's clear intent after a couple of generations in order to disburse the funds of the trust to those who do not fit its provisions, and who have done nothing to earn or otherwise merit the disbursements, rather than allowing the incentive created by the settlor to survive for so long as the administration of the trust remains efficient.

96. The recent move toward the unitrust form or, less elegantly, equitable adjustment, *see supra* note 89 (discussing the two developments), arises from a recognition that it is inefficient to invest on the basis of whether the wealth that the investments are forecast to generate would fall under the traditional categories of income and principal. The wiser course is simply to make the investments most suited to the trust's total risk profile, and then to ascribe a certain percentage of the whole value of the *res* to the "income" beneficiaries. *See* Alyssa A. DiRusso & Kathleen M. Sablone, *Statutory Techniques for Balancing the Financial Interests of Trust Beneficiaries*, 39 U.S.F. L. Rev. 261, 275–88, 310 (2005) (comparing equitable adjustment to unitrust, and listing the states that had, as of 2005, adopted unitrust legislation); Dobris, *supra*

the total average value of the *res* of the trust, rather than as a fraction of the income from the trust in any period. A specific threshold fraction has not yet been proposed, pending better information about the optimal fraction to be employed.[97] (States could of course elect different thresholds, but satisfying uniformity would best be achieved if a

note 66, at 5–6 (reviewing several approaches that deal with the fair allocation of investment return between successive beneficiaries).

97. Another option would be to establish a "mud" rather than a "crystal" standard—one which merely required trustees to modify or wind up the trust when administrative expenses became "unreasonable," then allowing the courts to fill in the content of reasonability. *See generally* Carol Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988) (distinguishing between "hard-edged . . . 'crystal'" rules and "fuzzy, ambiguous . . . 'mud'" rules). A couple of objections arise to employing a mud rule in this instance, however. First, as noted above, the Uniform Trust Code already contains a mud rule designed to restrict trustees from continuing "administrat[ion] of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration." UNIF. TRUST CODE § 412(b) (2005), 7C U.L.A. 507 (2006). This provision, though, has manifestly failed to calm the ALI's fears of rampant trust maladministration in the absence of an arbitrary-period rule against perpetuities. *See* RESTATEMENT (THIRD), *supra* note 4, ch. 27, at 560; *see also supra* note 29 and accompanying text. Presumably these fears arise because the ALI thinks that the provision is used only in the cases of truly the most ill-conceived trust provisions. *See supra* note 93 and accompanying text. Meanwhile, a more aggressive, yet still fundamentally "muddy" rule would likely prove counterproductive in this instance. One such rule would require trustees to seek court modification of any trust any time administration of that trust would prove unreasonable. But if this provision is not also to be honored in the breach, its effect will be to eat up the *res* of the trust not in expenses of administration related to distribution, but instead in expenses of administration related to judicial proceedings. It is in the nature of the trusteeship itself that trustees are (or become) small-"c" conservatives when administering the trusts placed in their care. If they fail to distribute funds that they should distribute, and are sued by a beneficiary, then they may defend the suit using trust assets (assuming that their position is reasonable) and, if they lose, merely pay more from the *res* of the trust. (Alternatively, if a would-be beneficiary objects that payments should issue from the trust, the trustee can simply plead the question to the court.) If, on the other hand, a trustee should pay out more to a beneficiary than the trust permits, or pay to someone who was not rightly adjudged a beneficiary, then the trustee is personally liable. This creates a certain conservatism in distribution. The case would be the same if the UPRA were to establish a muddy, but mandatory, rule of administrative efficiency. It would not be clear to trustees after such a rule were adopted just what constituted "reasonable" administrative costs. To avoid falling foul of the rule, trustees would plead the question into the court, thus occasioning administrative expenses. The courts would then have two choices. They could either establish, through precedent, some firm, crystalline rule (e.g., exceeding X percent of the average annual value of the trust in distributive administration expenses is unreasonable) or could generate muddy addenda to the original muddy standard. The former result would just emulate the crystal rule that should be articulated in the UPRA, at one remove. The latter result would see trustees perpetually expending significant resources in determining the meaning of "reasonability" in the case of any given trust. The best choice is to opt for a crystalline rule of administrative efficiency from the first.

convincing argument in favor of a single optimum threshold could be posited at the time of promulgating a uniform rule.)

C. Protecting Against Stale Provisions

Section 7 of the UPRA would protect against the possibility that grants will continue to be governed long into the future by beneficiary-class definitions that will have grown stale—increasingly out of sync with changing technologies, political realities, and social mores—as the centuries wear on. The reasoning supporting the inclusion of an anti-staleness provision, and an overview of the two options that are available for this purpose, was included above.[98] It remains here simply to discuss the technical details.

The first, and weaker, anti-staleness provision simply provides an interpretive default. It establishes that terms employed in a grant—most especially, but not limited to, beneficiary-class definitions, will be interpreted in accordance with the definitions of those terms *at the time of each distribution authorized under the grant*, rather than in accordance with the definitions in use at the time the grant was established. Hence, for instance, imagine a trust established in 1650 to pay out income once a decade to a settlor's "heirs," without any fixed definition having been supplied for the term "heirs." In 1650 that term excluded descendants born out of wedlock;[99] necessarily excluded adopted children, as that "creature of statute"[100] had not yet been conjured by Parliament;[101] and of course excluded children conceived after the death of a parent (though not posthumously *born* children),[102] and children conceived with the assistance of surrogacy or reproductive technology, as these wonders had not yet been drawn from the mind of science. With this presumption in place, though, as the centu-

98. *See supra* Part II.D.

99. *See* 1 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 749 (Sir Henry Gwillim, ed., 7th ed. 1832) (heirs included "[a]ll persons born within marriage . . . unless there is an apparent impossibility that they should be generated by the husband . . . .").

100. This is perhaps the introductory commonplace in any discussion of adoption in the Anglo-American legal tradition. *See, e.g.*, *In re* McDuffee, 341 S.W.2d 315, 317 (Mo. Ct. App. 1960) ("It is a familiar fact that adoption was unknown at common law and that the subject is wholly governed and strictly limited by statute."); HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 9.4 (2d ed. 1988).

101. In fact, England and Wales did not permit formal adoption until 1926. *See* Adoption of Children Act, 1926, 16 & 17 Geo. 5, c. 29 (Eng.).

102. Throughout English history, children born within the reasonable gestational period after the married father's death could be considered legitimate children if such treatment would benefit the child. *See, e.g.*, 2 WILLIAM BLACKSTONE, COMMENTARIES *130, *456.

ries progress, and as the legal definition of "heirs" morphs, so too will morph—for the purposes of *that and future* distributions, but not for *previous* distributions—the boundaries of the class to whom benefits shall be paid.[103]

The second alternative anti-staleness presumption is strengthened by including a rejection of boilerplate language that includes no details or specific instructions relevant to the interpretation of the specific provision under consideration. Consider again the illustration employed above. Now imagine that the settlor had included in the declaration of trust a boilerplate provision indicating that "all terms in this declaration shall be defined and interpreted in accord with definitions currently in use," but making no reference to any specific term or definition or to the characteristics of the present interpretation that the settlor considers essential. Under the alternative anti-staleness presumption, this boilerplate language would be ignored. The justification for this stronger presumption is that the settlor gave no thought to the boilerplate provision, to how various class or other definitions might change over time, or even to what the definitions actually were at the time the trust became effective. Thus the settlor's intent, to the extent that it is expressed at all by this boilerplate, cannot be permitted to defeat the public's policy interest in keeping definitions "fresh." This might be considered the "deal" struck in exchange for permitting multi-century or perpetual trusts.

103. This illustration demonstrates how the various provisions in the UPRA work together to create a smoothly functioning, coherent mechanism. Posit again the trust imagined above. Now imagine that in 1660 one of the settlor's beneficiaries had produced a child out of wedlock. In the 1660 distribution the illegitimate child would not take, according to the definition of heirs then in effect. The same definition, and the same result, would obtain through many centuries. Imagine now that, in the relevant jurisdiction, the definition of "heir" is revised in the 1890s so that as of the 1900 distribution, "heirs" is defined to include illegitimate children. Obviously, according to this anti-staleness presumption, any claimants living at the time of the 1900 distribution who could demonstrate that they were illegitimate descendants of the settlor would now qualify to take a share of the distribution henceforth. Just as obviously, the trustee would face a truly massive, likely crippling administrative expense were the trustee obliged now to search the (undoubtedly highly inconclusive) records of all of the jurisdictions in which any *legitimate* descendants had ever lived in the intervening centuries in order to discover whether any illegitimacies had occurred, and then trace down through the centuries to discover whether any descendants of those illegitimate descendants still survived, in order to include those descendants in the 1900 distribution. Hence, the rule of administrative efficiency, *see supra* UPRA § 6, would require the trustee to modify (or seek modification of) the trust to eliminate the trustee's duty to *seek out* any would-be beneficiaries-through-illegitimacy, while still continuing to pay any beneficiaries-through-illegitimacy who now qualified as beneficiaries and who sought out the trustee and brought with them sufficient evidence of their connection to the settlor.

Note what this stronger alternative presumption does *not* reject: any *specific* limitations on class-beneficiary or other definitions. Hence, imagine that the settlor in 1650 discussed above[104] had included in the trust documents not boilerplate language, but explicit language indicating that "the term 'heirs' shall never, for the purposes of this trust, include adopted children." *That* provision would be honored through the ages (unless it should eventually be thought so noxious as to have become unenforceable by the courts).[105] There can be no argument that it was made carelessly, or without thought; rather it fully and expressly describes distinct settlor intent.

Whether states will prefer the first or second of these alternatives will depend on how they negotiate the trade-off between honoring the settlor's intent and advancing the public policy of keeping trust provisions—so far as is reasonable—consistent with evolving technologies, legal constructs, and social mores.

D. Protecting Against Noxious Provisions

Section 9 explicitly grants courts authority to refuse to enforce any conditions in trusts or other grants if and when such conditions should become noxious as violations of public policy. This proposition is straightforward, particularly as courts have always enjoyed—though admittedly have seldom availed themselves of—the power to declare particularly noxious conditions unenforceable.[106] Section 9 merely makes that power explicit, and provides an opportunity for each state legislature specifically to enumerate the kinds of conditions it considers violative of public policy. The text of the section includes examples of provisions that some states have considered public-policy violations while others have not, including conditions that deter marriage, limit creditors' rights, or distinguish on the basis of race, creed, or adoptive or legitimacy status.[107]

The open question in this section is whether the list of noxious conditions enumerated by the legislature should be considered complete, or whether judicial accretion to the legislative list should be permitted. States will differ in their conclusions on this point as they differ in drawing up their lists of noxious conditions. Some states may prefer to leave the matter entirely within the competency of the judiciary.

104. *See supra* Part II.D.
105. *See supra* Part II.D.; *infra* Part III.D.
106. *See supra* notes 76–78 and accompanying text.
107. *See supra* notes 76–78 and accompanying text (discussing different state results).

IV.
Achieving Uniformity

The previous Parts of this article present the argument that the Uniform Perpetuities Reform Act described herein proves doctrinally and practically superior to the ALI's proposed new perpetuities rule or other rules of perpetuities that states have previously adopted. This Part of the article focuses on the proposition that if the legal community wishes to achieve uniformity in this area of law, it should adopt this UPRA, and must in particular reject the ALI's proposed new rule.

As was noted above, 2011 marks the first year in which no state still clings entirely to the traditional rule against perpetuities, Alabama having finally that year rejected it in favor of the USRAP.[108] A significant number of states—but not a majority—have, like Alabama, adopted the USRAP and have not then moved on to even more relaxed regimes.[109] The majority of states, though, have either moved on from the USRAP to these more relaxed regimes or have skipped directly to the latter conditions without ever having adopted the USRAP.[110] Significantly, no jurisdiction has adopted a looser regime then moved backward toward a tighter one. Equally significantly, the states that have moved to a regime looser than that of the USRAP have not moved in uniformity; as a result, the states evince significant disparity in their perpetuities regimes, perhaps as much disparity and lack of uniformity as has ever existed on this front.[111]

In other words, all of the impetus in the states on the question of perpetuities reform for a quarter of a century and more has been in the direction of decreasing complexity of rule and increasing looseness of restriction. *All* of it. The uniform act proposed in this article recog-

---

108. *See* sources cited *supra* note 26.

109. *See supra* notes 26–30.

110. *See* sources cited *supra* note 29.

111. *See, e.g.,* Foster, *supra* note 26, at 411–13. As Foster related affairs in 2007:

> [E]veryone knows, the fearsome Rule Against Perpetuities ("Rule") is in trouble. This classic, common law rule, which voided future interests that remained nonvested past a certain period of time after their creation, exists pristine and unreformed in only one state today: Alabama. The Rule fell prey to several factors: its own shortcomings, changes in the nature of the property affected by the Rule, changes in tax law, and significant changes in the law of trusts, which have legitimized perpetual trusts and dynasty trusts. After decades of "perpetuities wars," the unmodified Uniform Statutory Rule Against Perpetuities (USRAP) is currently the law in roughly one-third of the states. About half of the states have legalized dynasty or perpetual trusts. A few have completely abolished the Rule in any form. [T]his unprecedented variation of perpetuities law from state to state presents risks and challenges for estate planners.

Id. Since 2007, Alabama has also adopted the USRAP. *See* 2011 Ala. Acts 532.

nizes this universal trend, and is designed to present a reform that both captures and reflects that momentum in a way that will render the proposed Act actually attractive to the states. For, after all, a uniform rule that is not adopted by the lion's share of the states either fails as a dead letter or, if adopted only by a few states, actually makes the non-uniformity amongst state laws worse.

The UPRA should prove attractive to the states primarily because it comports with the states' universally demonstrated desires. The states seek a solution to the problems that have for centuries animated and justified perpetuities rules—the inalienability problem and the dead-hand-control problem—that is less complex and awkward than the rule against perpetuities, and that conveys additional assurance to settlors that their intentions will be respected. The UPRA provides that solution while offering both advantages. It solves the inalienability problem by ensuring that all property the subject of conditional gifts will be under the management of a trustee empowered to alienate any portion of that property—either immediately or after (at most) ninety years, at the states' election.[112] It solves what remains of the dead-hand concern[113] with a set of injunctions to trustees and courts that do not expand their duties or liabilities, but provide additional guidance to ensure that settlor intent be actualized in ways that take account of evolving administrative facts as well as technological and social realities.[114] It achieves greater simplicity because all of the arbitrary trust-dissolution deadlines, and all of the clumsy formulae employed to determine those deadlines, are eliminated.[115] And it creates a wider scope for settlor intent by establishing a system in which well-constructed trusts, properly endowed, may continue to function for centuries into the future.

Additionally, everything in the UPRA is in a very meaningful way *organic*: its provisions arise either (1) out of reforms that the states have already in part taken, or (2) as natural outgrowths and extensions of provisions that already exist in the Uniform Trust Code

112. *See supra* UPRA §§ 4–5.

113. See discussion *supra* Part III.C.3, for more on the remnants of dead-hand concern.

114. *See supra* UPRA §§ 6–8.

115. The only calculation that even potentially remains is, for those states that elect to retain the unvested legal interest and to permit a period of mandatory inalienability, counting out ninety years after the grant becomes active, at which time unvested legal interests become equitable interests, and trustees previously denied alienability power automatically enjoy it. *See supra* UPRA §§ 4–5. But states have fulsomely demonstrated their willingness to make a single, ninety-year calculation.

and in state trust law.[116] Adopting the UPRA will not require states to adopt any novel mechanism, or to saddle either courts or trustees with unfamiliar obligations. The whole solution to what remains, in the twenty-first century, of the perpetuities problem, already exists in some basic form in the states' laws and traditions.

Compare this felicitous situation with the reception that the ALI's proposed new perpetuities rule can expect. The ALI's new rule fails in any way to address or capture the momentum in the states. Rather than creating a looser perpetuities regime, it creates one that promises, more often than not, to *reduce* the perpetuities period from the USRAP's ninety-year period to one of approximately fifty years.[117] Rather than creating a simpler perpetuities regime, or one that builds on existing state structures or developments, it instead introduces a brand new generation-calculating system that is not in place in any state, nor ever has been. State legislatures filled with lawyers seem wildly unlikely to reverse the unswerving course of the last quarter century to adopt a perpetuities rule that is *more* complicated than their current regimes and that gives their constituents, of both the grant-making and the grant-writing variety (settlors and lawyers) a shorter rather than a longer (or unlimited) perpetuities period.

The ALI has misfired before on exactly this topic in a very similar way. In its previous restatement, issued in 1979,[118] the ALI proposed a wait-and-see rule, but the ALI's proposal was not the ninety-year wait-and-see rule that eventually was adopted as the USRAP. Rather, the ALI's proposal retained the old twenty-one-years-plus-life-in-being formula of the traditional rule.[119] The states, seeking increased simplicity, almost universally ignored the ALI's proposal.[120] Instead, they followed the trend that had already developed in the states (i.e., the ninety-year wait-and-see rule),[121] with the new wave of

116. *See supra* notes 19, 26–30, 47 and accompanying text.

117. The reasoning here is simple. The ALI designated twenty-five years as the length of a generation. The average person two generations younger than a grantor, then, will be fifty years younger than the grantor, and will die (again, on average) about fifty years after the grantor—or perhaps a couple of years later, if life expectancies continue to rise as they have. Of course in some situations a beneficiary two generations younger than the grantor will die longer than fifty years later, but in some situations the reverse will be true. At all events, the ALI's proposed new perpetuities rule can be expected significantly to reduce the perpetuities period from that offered by the USRAP (i.e., ninety years). For additional discussion on this point, see Shepard, *supra* note 7, at 611–13.

118. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS §§ 1.1–1.6.

119. *Id.*

120. Only Iowa adopted it. *See* Dukeminier & Krier, *supra* note 9, at 1307.

121. *See id.* at 1305–06 (showing how six states had adopted the ninety-year wait-and-see rule by 1979, with Pennsylvania leading the pack in 1947).

states moving only upon promulgation of the USRAP, which adopted the ninety-year rule.[122] The ALI's current proposal multiplies the mistakes of 1979; at least that ALI proposal offered something—the wait-and-see reform—which was of interest to states. The current proposal swims in every way against the tide of reform in the states.

The Uniform Law Commission (ULC) has similarly learned, over the years, that proposed uniform laws that fail to capture the zeitgeist fail of adoption. A significant number of uniform laws adopted by the ULC have failed to anticipate and respond to trends and trajectories in the states, or to create a new trend and trajectory. As a result, the laws that they have promulgated have either lain entirely dormant or have been adopted only by one or a handful of states.[123] For the purposes of uniformity, the last result would in this case be the worst; the ALI's proposal so little resembles anything currently in place in the states that its adoption in just a few jurisdictions would add an entirely new layer of discordance amongst jurisdictions.

Conclusion

The world has changed quite a bit since the middle of the seventeenth century: its laws; its customs; its economy; its mores. The rule against perpetuities, a creature of that distant era, has adapted poorly to the myriad changes. The states of the Union have recognized this; all of them have, as of 2011, abandoned the traditional rule. The majority are moving toward effective or complete elimination of the rule. The Uniform Perpetuities Reform Act proposed in this article represents an attempt to fashion a uniform rule that comes to grips with the expressed desires of the states, and is designed to address what remain of the old concerns that motivated the traditional rule against perpetuities while still presenting a profile that states will find inviting enough actually to adopt. In all of these respects, it proves itself superior to the ALI's proposed new perpetuities rule, which swims against the tides of history and of legislative interest.

122. *See id.* at 1307–08 & n.20.

123. *See, e.g.*, Unif. Adoption Act (1994) (one state); Unif. Certificate of Title Act (2006) (no states); Unif. Mgmt. of Pub. Emp. Ret. Sys. Act (1997) (two states); Unif. Marital Prop. Act (1983) (one state).