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Unconstitutional Perpetual Trusts*

Steven J. Horowitz†
Robert H. Sitkoff‡

"I never can be thankful, Mr. Bennet, for any thing about the entail."[§]

Abstract

Perpetual trusts are an established feature of today's estate planning firmament. Yet little-noticed provisions in the constitutions of nine states, including five states that purport to allow perpetual trusts by statute, proscribe "perpetuities." This article examines those provisions in light of the meaning of "perpetuity" as a legal term of art across history. The article considers the constitutionality of perpetual trust statutes in states that have a constitutional ban on perpetuities and whether courts in states with such a ban may give effect to a perpetual trust settled in another state. Because text, purpose, and history all suggest that the constitutional proscriptions of perpetuities were meant to proscribe entails, whether in form or in function, and because a perpetual trust is in purpose and in function an entail, we conclude that recognition of perpetual trusts is prohibited in states with a constitutional prohibition of perpetuities.

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§ Jane Austen, *Pride and Prejudice* 128 (Penguin Classics 2009) (1813).

I. Introduction

The organizing principle of American succession law is freedom of disposition.¹ American law embraces freedom of disposition, enabling dead hand control, to a degree that is unique among modern legal systems.² But even within the permissive American tradition, freedom of disposition has never been absolute. American law protects a donor's spouse and creditors, allows for the imposition of transfer taxes, and imposes a handful of anti-dead-hand public policy constraints, the most venerable of which is the Rule Against Perpetuities (the "Rule").³ By requiring all interests to vest or fail within lives in being at the creation of the interest plus twenty-one years, the Rule puts a limit on trust duration of roughly 100 years.⁴

In recent years, however, a movement arose to repeal the Rule. Spurred on by a change to the federal tax code in 1986 that gave salience to long-term trusts in estate planning, lawyers and bankers have lobbied successfully for legislation in a majority of states to authorize perpetual (or effectively perpetual) trusts.⁵ The effect on practice has been profound. An empirical study, coauthored by one of us, found that through 2003, states that had repealed the Rule collectively experienced \$100 billion more growth in their trust businesses than states that had retained the Rule.⁶ Because this finding is based on data that is now ten years out of date, and because it reflects only trust funds held by trustees that are federally regulated banking institutions, it understates the effect of validating perpetual trusts in current practice.⁷ Perpetual trusts are today an established feature of the estate planning firmament.⁸

¹ See Restatement (Third) of Property: Wills and Other Donative Transfers §10.1 cmt. c (2003); Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 St. Louis L.J. 643 (2014).

² See Ray D. Madoff, *Immortality and the Law: The Rising Power of the American Dead* 6-7 (2010); Sitkoff, *supra* note __, at 643-44.

³ See Sitkoff, *supra* note __, at 644, 666-67.

⁴ See Jesse Dukeminier & Robert H. Sitkoff, *Wills, Trusts, and Estates* 880-882 (9th ed. 2013).

⁵ See Jeffrey A. Schoenblum, *2013 Multistate Guide to Estate Planning* tbl. 9 (2012); *infra* Figure __. For the basic story and the role of the tax code, see, e.g., Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. Rev. 1303 (2003); Grayson M.P. McCouch, *Who Killed the Rule Against Perpetuities?*, 40 Pepperdine L. Rev. 1291 (2013); Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 Cardozo L. Rev. 2465 (2006); Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 Cardozo L. Rev. 2097 (2003); Angela M. Vallario, *Death by a Thousand Cuts: The Rule Against Perpetuities*, 25 J. Legis. 141 (1999).

⁶ See Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 Yale L.J. 356, 410 (2005).

⁷ *Id.* at 411. "In the past four years, the amount of money administered by South Dakota trust companies ... has tripled to \$121 billion, almost all of it from out of state." Zachary R. Mider, *Moguls Rent South Dakota Addresses to Shelter Wealth Forever*, Bloomberg News, Dec. 27, 2013.

⁸ The practitioner literature is replete with articles touting the advantages of settling a perpetual trust in one state or another. See, e.g., Daniel G. Worthington & Mark Merric, *Which Situs is Best in 2014?*, Tr. & Est., Jan. 2014, at 53; Daniel G. Worthington, *Perpetual Trust States—The Latest Rankings*, Tr. & Est., Jan. 2007, at 59. Media coverage is also common. See, e.g., John Koten, *You're Dead, But Still in Control*, Wall St. J. (Mar. 8, 2013).

Yet little-noticed provisions in the constitutions of nine states, including five that purport to allow perpetual (or effectively perpetual) trusts, proscribe “perpetuities.”⁹ The North Carolina provision, which dates back to 1776, is illustrative: “Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed.”¹⁰ Is a statute that authorizes perpetual (or effectively perpetual) trusts constitutional in a state with such a provision? Should a court in a state with such a provision give effect to another state’s perpetual trust statute?

Answering these questions, which is the project of this article, requires an understanding of the meaning of “perpetuity” as that term is used in the state constitutions.¹¹ The North Carolina provision, which was the template for most of the others, predates John Chipman Gray’s canonical 1886 statement of the common law Rule Against Perpetuities by more than a century.¹² It is not immediately obvious, therefore, how to translate the rhetoric of “perpetuity,” as used in founding era state constitutions, into a doctrinal limit on government power to authorize perpetual trusts. The cases are scarce and contradictory.¹³

Given the “real and intense” competition among the states for trust business,¹⁴ the potential for these constitutional provisions to disrupt perpetual trust practice is of significant import. Nevada, which has been aggressive in its pursuit of trust business,¹⁵ provides an interesting case study. In 2002, proponents of perpetual trusts in that state

⁹ Although the perpetuities literature is abundant, very little of it addresses these constitutional provisions. See William E. Burby, *The Meaning of the California Constitutional Provision Prohibiting Perpetuities*, 1 S. Cal. L. Rev. 107 (1928); Lynn Foster, *Fifty-One Flowers: Post-Perpetuities War Law and Arkansas’s Adoption of USRAP*, 29 U. Ark. Little Rock L. Rev. 411 (2007); Robert H. Gerdes, “Perpetuities” and the California Rule Against Suspension of the Absolute Power of Alienation, 16 Cal. L. Rev. 81, 92-93 (1928); John V. Orth, *Allowing Perpetuities in North Carolina*, 31 Campbell L. Rev. 399 (2009).

¹⁰ N.C. Const. art. I, § 34. This text varies slightly from the version enacted in 1776. See N.C. Const. of 1776, Decl. of Rights § 23 (“That perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed.”).

¹¹ Scholars have become increasingly interested in state constitutional law, both for its own sake, see, e.g., Randy J. Holland et al., *State Constitutional Law: The Modern Experience* (2010); Jeffrey S. Sutton, *Courts As Change Agents: Do We Want More – or Less?*, 127 Harv. L. Rev. 1419 (2014); Emily Zackin, *Looking For Rights an all the Wrong Places: Why State Constitutions Contain America’s Positive Rights* (2013), and for how it might inform our understanding of the federal Constitution, see, e.g., Sanford Levinson, *Framed: America’s 51 Constitutions and the Crisis of Governance* (2012). See also John V. Orth & Paul M. Newby, *The North Carolina State Constitution 90-91* (2d ed. 2013) (discussing North Carolina’s constitutional prohibition of “perpetuities”).

¹² John Chipman Gray, *The Rule Against Perpetuities* §201 at 191 (Roland Gray ed., 4th ed. 1942).

¹³ See, e.g., *Estate of Hinckley*, 58 Cal. 457 (1881); *In re Sahlender’s Estate*, 201 P.2d 69 (Cal. App. 1948); *Griffin v. Graham*, 8 N.C. 96 (1820). The principal modern case is *Brown Bros. Harriman Trust Co. v. Benson*, 688 S.E.2d 752 (N.C. App. 2010). These and other relevant cases are addressed infra in Part [cx].

¹⁴ Sitkoff & Schanzenbach, supra note __, at 412.

¹⁵ See Worthington & Merric, supra note __. Nevada is, for example, a preferred jurisdiction for private trust companies. See Alan V. Ytterberg & James P. Weller, *Managing Family Wealth Through a Private Trust Company*, 36 ACTEC L.J. 501, 503 (2010); see also Iris J. Goodwin, *How the Rich Stay Rich: Using a Family Trust Company to Secure a Family Fortune*, 40 Seton Hall L. Rev. 467, 474-475 (2010).

recognized that the state constitution was a roadblock. So they sponsored a referendum to repeal the state's constitutional perpetuities provision. To their surprise,¹⁶ the referendum was rejected by a margin of 60 percent to 40 percent.¹⁷ Nevertheless, in the teeth of this vote, the legislature passed a bill permitting trusts to endure for 365 years.¹⁸ Is this legislation consistent with the state's constitutional commitment to prohibiting perpetuities? What of the reaffirmation of that commitment by the voters just prior to the enactment of the statute?

The remainder of this article is organized as follows. Part II provides context by reviewing the rise and fall of the Rule Against Perpetuities and the meaning of "perpetuity" as a legal term of art across history. Part III surveys the state constitutional provisions on perpetuities, tracing them back to the 1776 constitution of North Carolina. Part IV considers the constitutional prohibitions of "perpetuities" in light of their historical context, including the contemporaneous policy rhetoric and common law. Part V considers whether recognition of perpetual trusts is prohibited in states with a constitutional prohibition of perpetuities. We conclude that legislation authorizing perpetual or long-enduring dynasty trusts is constitutionally suspect in a state with a constitutional prohibition, but more modest reforms that approximate the common law Rule are permissible. We also suggest that the constitutional prohibitions might reflect the kind of strong public policy that would authorize a court in a state with such a provision to refuse to apply another state's law authorizing perpetual trusts. A short conclusion follows.

II. "Perpetuities," the Rule Against Perpetuities, and Perpetual Trusts

A. The Rise of the Rule¹⁹

The canonical statement of the common law Rule Against Perpetuities, formulated in 1886 by Professor John Chipman Gray, is this:

No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.²⁰

¹⁶ Prior to the vote, the sponsors wrote of the amendment's "expected voter approval." Steven J. Oshins & Judith K. Ruud, *Dynasty Trusts in Nevada: Countdown to 12/01/02*, 9 Nev. Law. 18 (2001).

¹⁷ Election 2002, *Reno Gazette-Journal*, Nov. 8, 2002, at 3C.

¹⁸ See N.R.S. § 111.1031(1)(b). There have also been efforts, thus far unsuccessful, to repeal the constitutional ban on perpetuities in Texas and in North Carolina. See Ashley Vaughan, *You Can't Take It with You: Property Rights After Death and Rethinking the Rule Against Perpetuities*, 47 S. Tex. L. Rev. 615, 637-39 (2006) (Texas); Act to Amend N.C. Const., Mar. 23, 2011, 2011 NC S.B. 398 (North Carolina).

¹⁹ Portions of this section are adapted from Dukeminier & Sitkoff, *supra* note __, at 878-882. In surveying the historical development of the Rule, this Article has relied primarily on Gray, *supra* note __, at 126-190.

²⁰ Gray, *supra* note __, at 191; see also Stephen A. Siegel, *John Chipman Gray, Legal Formalism, and the Transformation of Perpetuities Law*, 36 U. Miami L. Rev. 439 (1982).

Because of the deference paid to Gray's work by the courts, the Rule has sometimes been treated as if it were laid down at one time by this one man. In truth, the Rule had a complicated evolution over several centuries.

1. *Predicates to the Rule*

Before the Statute of Uses (1535) and Statute of Wills (1540),²¹ there was little need for a rule limiting contingent future interests in remote persons, as such interests were rare and easily destroyed before becoming problematic.²² After the new forms of disposition allowed by the Statute of Uses and Statute of Wills, judges struggled to fashion a rule against perpetuities without clearly defining what a perpetuity was.²³ The prevailing understanding was that a perpetuity was an *entail*—that is, an estate that would pass forever in accordance with a prescribed succession so that the holder of the possessory interest could neither alienate his interest nor alter the subsequent line of succession.²⁴

The formal entail originated in the Statute *De Donis Conditionalibus* (1285).²⁵ Feudal barons, resisting the movement toward free alienation of land, convinced Parliament to authorize in *De Donis* the creation of the fee tail, an estate in land that passes to the original tenant's descendants in a perpetual string of life estates.²⁶ Courts responded by fashioning the "common recovery," a suit by which the possessory tenant could transform his fee tail interest into fee simple,²⁷ a procedure known as "barring" or "docking"

²³ See Gray, *supra* note __, at 138-160; see also Lloyd Bonfield, *Marriage Settlements, 1601-1740: The Adoption of the Strict Settlement 21-45* (1983) (discussing the "tortuous path to a comprehensive rule against perpetuities"). Before the new forms of disposition allowed by the Statute of Uses and Statute of Wills, there was little need for a rule limiting contingent future interests in remote persons, as such interests were rare and easily destroyed before becoming problematic. Gray, *supra* note __, at 134-35.

²³ See Gray, *supra* note __, at 138-160; see also Lloyd Bonfield, *Marriage Settlements, 1601-1740: The Adoption of the Strict Settlement 21-45* (1983) (discussing the "tortuous path to a comprehensive rule against perpetuities"). Before the new forms of disposition allowed by the Statute of Uses and Statute of Wills, there was little need for a rule limiting contingent future interests in remote persons, as such interests were rare and easily destroyed before becoming problematic. Gray, *supra* note __, at 134-35.

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²⁴ "In the sixteenth and seventeenth centuries the word [perpetuity] was so generally used in this sense that it might be said to be its normal meaning." Sweet, *supra* note __, at 203.

²⁵ 13 Edw. 1, c. 1 (Eng.).

²⁶ See Dukeminier & Krier, *supra* note __, at 1319-20.

²⁷ The literature traces this procedure to *Taltarum's Case*, Y.B. 12 Edw. 4, fol. 19, Mich., pl. 25 (1472) (Eng.), reprinted in 2 Frederic William Maitland, *The Collected Papers of Frederic William Maitland* 310 (H. A. L. Fisher ed., 1911).

the entail.²⁸ As Gray put it, the common recovery “broke[] down the ‘perpetuities’ of estates tail.”²⁹

The lawyers for England’s wealthy families fought back by combining life estates in one generation with contingent remainders in successive generations.³⁰ In Gray’s telling, “it occurred to some ingenious person that it was perhaps possible to keep control over the ownership of property for a time by granting an estate for life with contingent remainders, for, as contingent remainders were not transferable, no alienation of the fee could take place until they vested.”³¹ In response, the judges developed the law of future interests, which allowed for the destruction of such remainders.³²

The destructibility doctrines could be avoided, however, by using executory interests, authorized by the Statute of Uses, instead of contingent remainders.³³ By this “ingenuity of conveyancers, aided by the inadvertence of the judges,”³⁴ wealthy landowners could again implement “an infinite series of future interests that might remove land permanently from commerce.”³⁵ Tellingly, the first cases to use the term “perpetuity,” decided in the 1590s, recognized the functional equivalence of this use of indestructible executory interests to the unbarrable entail.³⁶

Across the 1600s, the judges developed a body of perpetuities law in answer to the indestructible executory interest, that is, to prevent what was in function an entail by way of such interests. As Gray put it:

The evils arising from the Statute *De Donis* creating inalienable estates tail were familiar to the courts, and after their predecessors had . . . broken down the “perpetuities” of estates tail, . . . they were resolved not to have them surrep-

²⁸ See Francis Stoughton Sullivan, *Lectures on the Constitution and Laws of England 162-69* (2d ed. 1776). Use of the word “dock” as verb meaning “[t]o cut short in some part,” especially “in the tail, hair, or similar appendage,” traces back several centuries. See III *The Oxford English Dictionary* 569 (James Augustus Henry Murray ed. 1933).

²⁹ Gray, *supra* note __, at 150.

³⁰ See Dukeminier & Krier, *supra* note __, at 1320; see also Bonfield, *supra* note __, at 45.

³¹ Gray, *supra* note __, at 140.

³² See *id.* at 140-41; Dukeminier & Krier, *supra* note __, at 1320. Destruction was achieved chiefly by way of the doctrine of destructibility of contingent remainders and the rule in *Shelley’s Case*. See Dukeminier & Krier, *supra* note __, at 1320.

³³ See Gray, *supra* note __, at 147-48 (collecting authority).

³⁴ Gray, *supra* note __, at 141.

³⁵ Dukeminier & Krier, *supra* note __, at 1320.

³⁶ See Gray, *supra* note __, at 141. The cases are *Corbet’s Case*, (1599) 76 Eng. Rep. 187 (K.B.); 1 Co. Rep. 83 b, and *Chudleigh’s Case*, (1594) 76 Eng. Rep. 261 (K.B.); 1 Co. Rep. 113 b. See also Percy Bordwell, *The Iowa Contingent Remainder Act—The Rule Against Perpetuities*, 10 *Iowa L. Bull.* 275, 281 (1925) (“The three examples of perpetuity which the judges in *Corbet’s Case* and in *Chudleigh’s Case* seem to have had in mind were the unbarrable entail, the indestructible contingent or executory interest and the perpetual freehold. The perpetual freehold was a limitation of life estates to successive generations of heirs.”) (citations omitted).

titiously introduced by entailing long terms, to which the device of common recovery could not be applied.³⁷

Gray summarized the emerging body of perpetuities law thus: “Any number of life interests could be given in succession to persons in being. Limitations to unborn persons might be good[,] . . . but under what restrictions was far from clear.”³⁸

2. *The Duke of Norfolk’s Case*

The amorphous body of law governing perpetuities was fashioned into the Rule Against Perpetuities in the *Duke of Norfolk’s Case* (1682).³⁹ Thomas, the eldest son and heir apparent of the Earl of Arundel, was incompetent. The earl therefore assumed that eventually the earldom would descend to his second son, Henry. In that event, the earl wanted the barony of Grostock, which he planned to give initially to Henry, to shift to his fourth son, Charles.

When the Earl of Arundel died, the earldom descended to Thomas. Henry assumed control of the properties accompanying the title. He also engineered the restoration of the title “Duke of Norfolk” to the family. When Thomas died, the dukedom descended to Henry (thus the *Duke of Norfolk’s Case*). But Henry did not want to give up the barony of Grostock. So Charles brought a bill in chancery to enforce his interest. Henry resisted, arguing that the executory interest in Charles was a perpetuity and thus void.

Sympathetic to the rational estate planning of a landowner with an incompetent son, Lord Chancellor Nottingham was of the opinion that Charles’s interest would “wear out” in a single lifetime (Thomas’s) and, hence, it should not be regarded as a perpetuity.⁴⁰ “A perpetuity,” said Nottingham, “is the settlement of an estate or an interest in tail, with such remainders expectant upon it, as are in no sort in the power of the tenant in tail in possession to dock by any recovery or assignment.”⁴¹ The critical issue was the time at which the contingent future interest would vest. Nottingham ruled that if a future interest necessarily would vest or fail during or at the end of a life in being, it is good.⁴² The House of Lords agreed.⁴³

3. *Toward Lives in Being Plus Twenty-One Years*

³⁷ Gray, *supra* note __, at 150.

³⁸ *Id.*, *supra* note __, at 160 & n.2.

³⁹ (1682) 22 Eng. Rep. 931 (Ch.); 3 Chan. Cas. 1; *see also* Gray, *supra* note __, at 161-163; Herbert Barry, *The Duke of Norfolk’s Case*, 23 Va. L. Rev. 538 (1937).

⁴⁰ 22 Eng. Rep. at 948; 3 Chan. Cas. at 29.

⁴¹ *Id.* at 949, 3 Chan. Cas. at 31.

⁴² *See* 22 Eng. Rep. at 960-61; 3 Chan. Cas. at 49-50.

⁴³ *See* Barry, *supra* note ____, at 557-61.

After the *Duke of Norfolk's Case*, the judges refined the test for a perpetuity in relation to Nottingham's life-in-being holding. Hence, just fifty years later, in 1732, we find in *Stanley v. Leigh* the term "perpetuity" described as "a legal word or term of art" meaning "the limiting [of] an estate . . . in such manner as would render it unalienable longer than for a life or lives in being at the same time, and some short or reasonable time after."⁴⁴ Six years later, in *Stephens v. Stephens* (1736), the permissible perpetuities period was clarified as including the minority of a beneficiary, up to twenty-one years, in addition to lives in being.⁴⁵ In 1805, *Thellusson v. Woodford* established that any number of lives in being that could reasonably be traced could be used.⁴⁶ Finally, in *Cadell v. Palmer* (1833), the perpetuities period was settled at any reasonable number of lives in being plus twenty-one years in gross plus any actual periods of gestation.⁴⁷

Significantly, in the first edition of Blackstone's *Commentaries*, in a volume published in 1766, we find the statement that "[t]he utmost length that has been hitherto allowed, for the contingency of an executory devise of either kind to happen in, is that of a life or lives in being, and one and twenty years afterwards."⁴⁸ Blackstone was the leading authority for "the common law at the point of American separation," one in which "[t]he American Founders were steeped."⁴⁹

As developed by the judges after the *Duke of Norfolk's Case*, the Rule Against Perpetuities permitted a donor's freedom of disposition to be exercised in a way that included indestructible contingent future interests, but only as regards persons the donor could have known (lives in being) plus the minority of the next generation (plus twenty-one years).⁵⁰ The underlying purpose of the Rule was to prevent resurrection of the entail by way of a string of successive life estates subject to indestructible contingent future interests. Brian Simpson's capsule summary is apt:

⁴⁴ (1732) 24 Eng. Rep. 917, 917-18 (Ch.); 2 P. Wms. 686, 688.

⁴⁵ (1736) 25 Eng. Rep. 751 (Ch.); Cas. t. Talb 228.

⁴⁶ (1805) 32 Eng. Rep. 1030 (Ch.); 11 Ves. Jr. 112. *Thellusson* is also the origin of the common law rule against accumulations of income. See Patrick Polden, *Peter Thellusson's Will of 1797 and Its Consequences on Chancery Law* (2002); Robert H. Sitkoff, *The Lurking Rule Against Accumulations of Income*, 100 Nw. U. L. Rev. 501 (2006).

⁴⁷ (1833) 6 Eng. Rep. 956 (H.L.); 1 Cl. & Fin. 372.

⁴⁸ 2 Blackstone, *Commentaries on the Laws of England* *174 (1766).

⁴⁹ John H. Langbein, Renee Lettow Lerner & Bruce P. Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions* 841-842 (2009).

⁵⁰ In a series of lectures on the dead hand published as a book in 1880, Sir Arthur Hobhouse famously summarized this functional logic for the "lives in being" test thus:

A clear, obvious, natural line is drawn for us between those persons and events which the Settlor knows and sees, and those which he cannot know or see. Within the former province we may trust his natural affections and his capacity of judgment to make better dispositions than any external Law is likely to make for him. Within the latter, natural affection does not extend, and the wisest judgment is constantly baffled by the course of events.

Arthur Hobhouse, *The Devolution and Transfer of Land in The Dead Hand: Addresses on the Subject of Endowments and Settlements of Property* 188 (1880).

[T]here were many expressions of hostility to perpetuities, and a perpetuity meant an unbarrable entail, in whatever guise it appeared. This hostility found expression in . . . the celebrated “rule against perpetuities” This doctrine . . . prevented the evolution, under some newer guise, of any form of perpetual unbarrable entail, but permitted unbarrable entails of limited duration.⁵¹

B. Reforming the Rule⁵²

The common law Rule Against Perpetuities is a rule of logical proof. A contingent future interest is void at the outset if it is not certain to vest or fail – that one or the other *must* happen – within twenty-one years after the death of a life in being at the creation of the interest. In practice, therefore, the Rule became, as Professor W. Barton Leach famously complained, “a trap to the draftsman.”⁵³ By giving recurring mistakes under the Rule ludicrous but memorable names – such as the *fertile octogenarian*, *unborn widow*, and *slothful executor*⁵⁴ – Leach drew attention to the Rule’s exasperating complexities and absurd assumptions in a way that fired up a reform movement.⁵⁵

The ensuing reform of the Rule can be sorted into two basic categories: reformation (or *cy pres*) and wait-and-see.⁵⁶ The Uniform Statutory Rule Against Perpetuities (1986) (USRAP), adopted in about half the states,⁵⁷ adopts both wait-and-see and reformation, as does a new Restatement provision published in late 2011.⁵⁸ Crucially, however, each of these reforms is true to the historical purpose of the Rule in that none permits perpetual entailment of property. Each preserves a limit on the duration of indestructible contingent future interests that is a reasonable approximation of the common law period of lives in being plus twenty-one years. The aim of Leach and the other reformers was to permit “reasonable dispositions” that did not offend the anti-dead-hand policy of the Rule. In Leach’s words, “this is a job for the repair shop, not the scrap yard.”⁵⁹

1. Reformation

Application of the reformation doctrine to avoid a perpetuities violation is au-

⁵¹ A.W.B. Simpson, *Entails and Perpetuities*, 24 *Jur. Rev.* 1, 17 (1979).

⁵² Portions of this section are adapted from Dukeminier & Sitkoff, *supra* note __, at 882-895.

⁵³ W. Barton Leach, *Perpetuities in a Nutshell*, 51 *Harv. L. Rev.* 638, 642 (1938).

⁵⁴ *See* Dukeminier & Sitkoff, *supra* note __, at 884-89 (describing these and other fantastical happenings in perpetuities land, including the *precocious toddler*, the *magic gravel pit*, the *war that never ends*, and the *birthday present that blows up*).

⁵⁵ *See* W. Barton Leach, *Perpetuities in Perspective: Ending the Rule’s Reign of Terror*, 65 *Harv. L. Rev.* 721 (1952); W. Barton Leach, *Perpetuities: Staying the Slaughter of the Innocents*, 68 *L.Q. Rev.* 35 (1952). It bears emphasis that

⁵⁶ A third category is self help by way of a saving clause, which guards against an overlooked violation of the Rule. *See* Dukeminier & Sitkoff, *supra* note __, at 890-91.

⁵⁷ *See* Schoenblum, *supra* note 5, at tbl. 9, q. 1.

⁵⁸ *See* Restatement (Third) of Property: Wills and Other Donative Transfers §27.1 (2011).

⁵⁹ Leach, *Terror*, *supra* note __, at 748.

thorized by statute or judicial decision in many states.⁶⁰ Under this reform, a court may modify a trust that violates the Rule to carry out the settlor's intent within the perpetuities period. For example, a court might change the period of an executory interest from twenty-five years after the death of a life in being to twenty-one years or insert a saving clause adapted to the particular possibility that would otherwise cause the gift to be invalid.⁶¹ Because the donor undoubtedly intended the gift to be valid, reformation carries out the donor's probable intent – but only within the period of the Rule. As such, reformation does not undermine the function of the Rule as a policy limit on the temporal scope of the donor's freedom of disposition.

2. *Wait-and-See*

Probably the more important reform is the wait-and-see doctrine. This reform replaces the *what-might-happen* possibilities test of the common law Rule with a *what-does-happen* test.⁶² In a state that has adopted wait-and-see, the court will wait and see what actually happens; it will not invalidate an interest because of what might happen.

But for how long should a court wait and see? Leach believed that the common law provided an inherent wait-and-see period: the lives relevant to vesting of the interest plus twenty-one years.⁶³ The Restatement (Second) of Property, published in 1983, prescribed a fixed list of measuring lives.⁶⁴ USRAP, promulgated three years later in 1986, prescribed a fixed wait-and-see period of ninety years.⁶⁵ In England, Parliament adopted an eighty-year period in 1964 and then a 125-year period in 2009.⁶⁶

The theory behind switching from lives in being plus twenty-one years to a fixed term of years was one of simplification. Professor Lawrence W. Waggoner, the reporter for USRAP, explains that the drafters of the uniform rule tried to approximate “the average period of time that would traditionally be allowed by the wait-and-see doctrine.”⁶⁷ It

⁶⁰ See Schoenblum, *supra* note __, at tbl. 9, q. 5-6.

⁶¹ See Jesse Dukeminier, A Modern Guide to Perpetuities, 74 Cal. L. Rev. 1867, 1898-1901 (1986).

⁶² The rise of wait-and-see was accompanied by a furious academic debate. See, e.g., Lewis M. Simes, Is the Rule Against Perpetuities Doomed? The “Wait and See” Doctrine, 52 Mich. L. Rev. 179 (1953); W. Barton Leach, Perpetuities Legislation: Hail, Pennsylvania!, 108 U. Pa. L. Rev. 1124 (1960); see also Susan F. French, Perpetuities: Three Essays in Honor of My Father, 65 Wash. L. Rev. 323, 332-34 (1990) (discussing the “Perpetuities Wars”).

⁶³ See Leach, *supra* note __, at 1146; see also Jesse Dukeminier, Perpetuities: The Measuring Lives, 85 Colum. L. Rev. 1648, 1654-1674 (1985).

⁶⁴ See Restatement (Second) of Property: Donative Transfers §1.3 (1983).

⁶⁵ Unif. Statutory Rule Against Perpetuities §1 (1986).

⁶⁶ See D.J. Hayton, The Law of Trusts 106 (4th ed. 2003); Perpetuities and Accumulations Act, 2009, c. 18, §§5, 7 (Eng. & Wales).

⁶⁷ Lawrence W. Waggoner, The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period, 73 Cornell L. Rev. 157, 162 (1988). The promulgation of USRAP prompted another furious academic debate. In addition to the Waggoner article just cited, see Jesse Dukeminier, The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo, 34 UCLA L. Rev. 1023, 1033 (1987); Lawrence W.

is true that ninety years is a fair, though probably shorter, approximation of the period that could be obtained with an aggressive saving clause. The recent English move to 125 years was based on similar reasoning. The Law Commission report presaging the legislation concluded plausibly that 125 years “is probably the longest period that can be obtained under the present law.”⁶⁸

Because wait-and-see – whether for lives in being plus twenty-one years, ninety years, or even 125 years – limits the dead hand to the common law perpetuities period or a reasonable approximation of that period, it honors the basic policy of the Rule. Replacing the what-might-happen test of the common law with a what-does-happen test, even across ninety or 125 years, does not permit a “perpetuity” by way of ongoing entailment of property.

3. *The Restatement (Third) of Property*

In a Restatement provision published in 2011, the American Law Institute promulgated a new perpetuities rule with a two-generations wait-and-see period followed by reformation.⁶⁹ Generally speaking, the two-generations period is measured by the life of any beneficiary who is no more than two generations younger than the settlor.⁷⁰ The Restatement therefore allows for a person not in being at the creation of the interest to be a measuring life, but only if that person is no more than two generations younger than the settlor.⁷¹ Which is to say, the Restatement does not authorize a functional entail. To the contrary, a two-generation trust has long been possible under the common law Rule. The new Restatement rule is, in truth, a simplified approximation of the traditional perpetuities period.⁷²

Waggoner, Perpetuity Reform, 81 Mich. L. Rev. 1718 (1983); and pages 1648 through 1747, inclusive, of Volume 85 of the Columbia Law Review (1985), spanning five articles.

⁶⁸ English Law Comm’n, Report No. 251, *The Rules Against Perpetuities and Excessive Accumulations* 101 (1998) available at http://lawcommission.justice.gov.uk/docs/lc251_The_Rules_Against_Perpetuities_and_Accumulations.pdf.

⁶⁹ See Restatement (Third) of Property: Wills and Other Donative Transfers §27.1 (2011).

⁷⁰ Id. §27.1(b)(1).

⁷¹ See Lawrence W. Waggoner, *The American Law Institute Proposes a New Approach to Perpetuities: Limiting the Dead Hand to Two Younger Generations*, Univ. of Mich. Law School Pub. Law & Legal Theory Research Paper No. 200, at 9-10 (2010), available at <http://ssrn.com/abstract=1614936>. For a critical take, see Scott Andrew Shepard, *Which the Deader Hand? A Counter to the American Law Institute’s Proposed Revival of Dying Perpetuities Rules*, 86 Tul. L. Rev. 559 (2012).

⁷² Professor Waggoner, the principal architect of the new Restatement, elaborates:

Under the traditional lives-in-being approach, the longest-living individual who serves as a measuring life will eventually die, but that individual can be someone who is more than two generations younger than the transferor and can outlive the transferor by many decades, maybe even a century, but not much more and often less. Under the two-younger-generations approach, the longest-living individual who serves as a measuring life will eventually die, but that individual can be someone who is conceived and born after the transferor’s death and can outlive the transferor by many decades, maybe even a century,

C. Abrogating the Rule to Allow Perpetual Trusts⁷³

The story of the rise of the perpetual trust, and the political economy of the authorizing statutes, has been covered in depth elsewhere.⁷⁴ For present purposes, it will suffice to review: (1) the tax stimulus for the perpetual trust movement, (2) the race among the states to permit perpetual trusts, and (3) the basic structure of a prototypical contemporary perpetual trust. Because the statutes authorizing perpetual trusts permit perpetual entailment of property down the generations, they represent a sharp break from the common law tradition, going back several centuries, of proscribing entails “in whatever guise [they] appeared.”⁷⁵

1. *The Role of the Federal Transfer Taxes*

Prior to 1986, it was possible to avoid the estate tax, enacted in 1916, by way of successive life interests.⁷⁶ A donor could leave property to her child for life, then to her grandchild for life, and so on. Because a life estate terminates at death, and because the estate tax is levied only on the decedent’s transferable interests, in the foregoing example there would be no tax when, on the death of the child, the grandchild’s interest became possessory. Other than the tax levied on the original transfer creating the string of life estates, there would be no further transfer tax levied until the death of the final remainderperson, who would have taken the property in fee simple.

Normally this strategy would be implemented by way of a trust. *O* would create a trust for the benefit of her daughter, *A*, for life, then to her granddaughter, *B*, for life, and so on, with as many future interests down the generations as permitted by the Rule Against Perpetuities. To preserve flexibility, each generation could be given a power to appoint the remainder in further trust to persons in the next generation, but this is a detail that can be set aside for now.⁷⁷ For present purposes, the key points are two: First, the duration of a trust structured in this way – a tax-motivated partial resurrection of the entail – was curtailed by the Rule Against Perpetuities. Second, Congress tried to close the successive-life-estates loophole in 1986 with the generation skipping transfer (GST) tax.

but not much more and often less. Although the length of the two periods will be different in individual cases, the average length will probably work out to be about the same.⁷²

Waggoner, *supra* note __, at 9.

⁷³ Portions of this section draw on Sitkoff & Schanzenbach, *supra* note __, and Schanzenbach & Sitkoff, *supra* note __.

⁷⁴ See sources cited in *supra* note __.

⁷⁵ See *supra* note __ and text accompanying.

⁷⁶ See Dukeminier & Krier, *supra* note __, at 1312.

⁷⁷ See *infra* [cx].

The GST tax imposes a tax equal to the highest rate of the estate tax on any generation-skipping transfer.⁷⁸ In rough terms, a transfer to a grandchild, great-grandchild, or any other person who is two or more generations below the transferor is a generation-skipping transfer.⁷⁹ However, under the 1986 Act, every person was given an exemption to pass \$1 million, now \$5.34 million, free from federal wealth transfer taxes, including the GST tax.⁸⁰ By funding a trust with the amount of the settlor's exemption, successive generations can benefit from the trust fund, including subsequent appreciation, free from federal wealth transfer taxes.

As the prominent Boston estate planning lawyer, Raymond Young, foresaw in testimony to Congress in 1984, the combination of the GST tax and the exemption was sure to invite increased use of generation-skipping trusts, albeit Young assumed that such trusts would be limited in duration by the Rule Against Perpetuities.⁸¹ So did Congress. It put no limit on the duration of a transfer-tax-exempt trust, leaving that matter to be handled by state perpetuities law.⁸² In consequence, if a state's perpetuities law allowed a longer-term trust, more generations could benefit from the trust fund, free from transfer taxes. If a state were to permit a perpetual trust, successive generations could benefit from the trust fund, free from subsequent federal wealth transfer taxation, forever.

2. *The Race to Allow Perpetual Trusts*

For reasons that are not entirely clear, South Dakota abolished its Rule Against Perpetuities a couple of years prior to the GST tax.⁸³ Whatever the reason, the timing was fortuitous. Trust companies in South Dakota began advertising for out-of-state trust

⁷⁸ The GST tax provisions are located in Chapter 13 of the Internal Revenue Code. I.R.C. §§2601-2663.

⁷⁹ See *id.* § 2651 (defining generational assignments); *id.* § 2613 (defining skip and non-skip persons); *id.* § 2611 (defining generation-skipping transfer); *id.* § 2612 (defining taxable events).

⁸⁰ See *id.* §§ 2631(c), 2010(c). The \$5.34 million figure reflects the statutory inflation adjustment by the IRS announced for 2014. See IRS Rev. Proc. 2013-35.

⁸¹ Young testified:

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

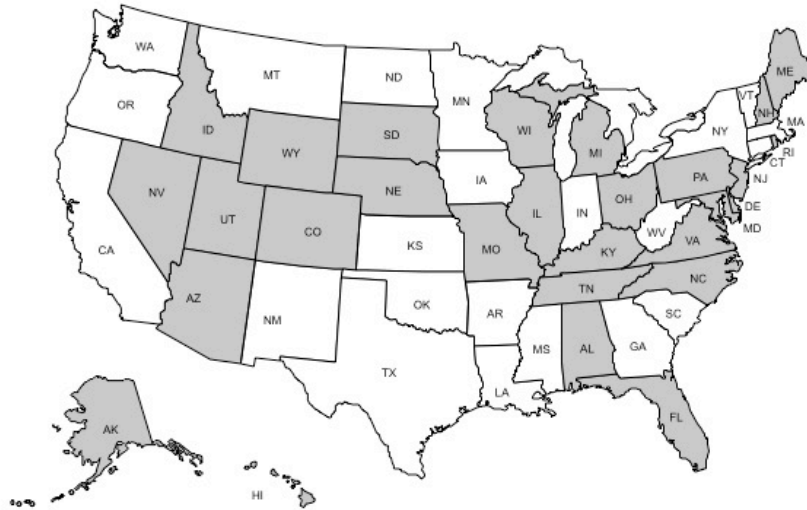
Generation-Skipping Transfer Tax: Hearings Before the H. Comm. on Ways and Means, 98th Cong. 335, 336 (1984) (testimony of Raymond Young). Young went on to say that such a trust could "last within the period of the rule against perpetuities." *Id.*

⁸² See Staff of Joint Comm. On Taxation, 108th Cong., Options to Improve Tax Compliance and Reform Tax Expenditures 394 (Comm. Print 2005) ("When Congress originally enacted a tax on generation-skipping transfers, it noted that '[m]ost States have a rule against perpetuities which limits the duration of a trust.'").

⁸³ See Schanzenbach & Sitkoff, *supra* note __, at 2481 & n.61. Idaho and Wisconsin had also abolished their versions of the Rule Against Perpetuities. But because those states levied a tax on income held in trust, they were not as desirable a situs for the creation of tax-avoiding perpetual trusts. See *id.* at 2491-92.

business by touting South Dakota as a place where a “generation skipping trust” was “possible” because “there is no rule against perpetuities.”⁸⁴ To keep up, in 1995 Delaware repealed its rule as applied to interests in trust. The official synopsis of the Delaware legislation notes that South Dakota’s repeal had given it “a competitive advantage over Delaware in attracting assets held in trusts created for estate planning purposes. . . . Several financial institutions have now organized or acquired trust companies, particularly in South Dakota, at least in part to take advantage of their favorable trust law.”⁸⁵

Perpetual Trusts Authorized (2013)



The Delaware statute triggered a race to authorize perpetual trusts. As illustrated by Figure __, today perpetual or effectively perpetual trusts appear to be authorized in Alabama (360 years), Alaska (1,000 years), Arizona (500 years), Colorado (1,000 years), Delaware, District of Columbia, Florida (360 years), Hawaii, Idaho, Illinois, Kentucky, Maine, Maryland, Michigan, Missouri, Nebraska, Nevada (365 years), New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee (360 years), Utah (1,000 years), Virginia, Wisconsin, and Wyoming (1,000 years).⁸⁶

⁸⁴ Dukeminier & Sitkoff, *supra* note __, at 897 (reproducing one such ad).

⁸⁵ H.R. 245, 138th Gen. Assemb. (Del. 1995) (bill synopsis).

⁸⁶ See Schoenblum, *supra* note __, at 9001-9382; see also Restatement (Third) of Property: Wills and Other Donative Transfers ch. 27, intro. note (2011) (collecting and classifying the statutes). Following Sitkoff & Schanzenbach, *supra* note __, at 433 & n.187, we have excluded Washington’s 150-year rule.

Some of the perpetual trust states have abolished the Rule altogether. Others have abolished the Rule as applied to interests in trusts in which the trustee has the power to sell the trust property and then reinvest the proceeds; that is, for trusts that do not suspend the power of alienation (see *infra* [cx]). Still others have

The race to authorize perpetual trusts was facilitated by two facts on the ground. First, wealth today is held predominately in portable liquid financial assets rather than land.⁸⁷ Liquid assets are easy to move to a jurisdiction with more favorable law, whereas land has long been subject to a situs choice-of-law rule.⁸⁸ Second, it is widely assumed that by naming a trustee located in another state and giving that trustee custody of the trust fund, a settlor can be assured that courts will enforce a provision specifying that the law of that state is to govern the validity and administration of the trust.⁸⁹ Some perpetual trust states even provide for this outcome expressly by statute,⁹⁰ as does the Uniform Trust Code.⁹¹ Together, these two points explain the political economy of the rise of the perpetual trust. Lawyers and bankers have lobbied for perpetual trusts to attract, or at least to retain, trust business.

3. Resurrecting the Entail

Here is a simplified example of the structure of a contemporary transfer-tax-exempt perpetual trust.⁹² *O* funds a trust with her exemption amount, to pay the income to her daughter, *A*, for life. The trust instrument gives *A* the power to appoint the trust corpus outright or in further trust to such of *O*'s descendants, other than herself, as *A* names by deed or by will. *A* is not given the power to appoint the trust property to herself, because such a power would give her ownership equivalence, which would bring the property into her taxable estate and would expose it to her creditors.⁹³ On *A*'s death, the remainder not appointed by *A* is to be held in separate share trusts for each of *A*'s children, subject to the same terms, thus restarting the cycle. The contemporary perpetual trust is, in other words, a modern fee tail.⁹⁴

To be sure, in the example just given, each generation has the power to bring an

abolished the Rule as applied to interests in personal property. Perhaps the oddest change is in the states that have transmogrified the Rule, which had been a mandatory limit on freedom of disposition, into a default rule that applies unless the settlor provides otherwise. At common law, the Rule was "not a rule of construction, but a peremptory command of law. It is not, like a rule of construction, a test, more or less artificial, to determine intention. Its object is to defeat intention." Gray, *supra* note __, § 629, at 599.

⁸⁷ See John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 Mich. L. Rev. 722 (1988).

⁸⁸ See Restatement (Second) of Conflicts of Laws §§278-79 (situs rule for validity and administration of trust of land); see also James Y. Stern, *Property, Exclusivity, and Jurisdiction*, 100 Va. L. Rev. 111, 150-58 (2014) (analyzing the situs rule).

⁸⁹ See, e.g., Sitkoff & Schanzenbach, *supra* note __, at 373-75; Sterk, *supra* note __, at 2101-04. The common law is in accord. See Restatement (Second) Conflict of Laws §270(a) (1971).

⁹⁰ See, e.g., Alaska Stat. § 13.36.035(c) (2013); S.D. Codified Laws § 55-3-48 (2013).

⁹¹ See Unif. Trust Code §§ 108(a), 403(2)-(3); see also Eugene F. Scoles, *Choice of Law in Trusts: Uniform Trust Code*, Sections 107 and 403, 67 Mo. L. Rev. 213 (2002).

⁹² This example is based on the form reproduced as Appendix A in Richard W. Nenno, *Delaware Trusts* 333-47 (2012).

⁹³ See Dukeminier & Sitkoff, *supra* note __, at 800-04.

⁹⁴ See *infra* notes __-__ and text accompanying.

end to the trust by giving the property outright to the next generation rather than in further trust. But the next generation cannot compel the prior generation to do so. Nor can the current generation take the property for itself. There is, in other words, no procedure by which to “dock” this entail.⁹⁵ Moreover, the power in one generation to appoint the property outright to the next generation is a feature of the trust as we have sketched it in accordance with standard formbook language.⁹⁶ Such a power is not required. To the contrary, in a state that has authorized perpetual trusts, *O* could create a trust for life benefit of each successive generation in perpetuity, with no power in those successive generations to terminate the trust or change the order of succession.⁹⁷ Which is to say, *O* could create a fee tail.

III. Perpetuities in the State Constitutions

Eleven states have adopted constitutional bans on perpetuities, though two, Florida and California, later repealed them. These provisions, which are closely linked as a matter of historical development, can be grouped into four overlapping generations. Within each generation, the text of the provisions is substantively identical. And while the text varies across generations, all the provisions can be traced back to the North Carolina original.⁹⁸ Figure __ is a map of the nine states that currently have constitutional perpetuities prohibitions.

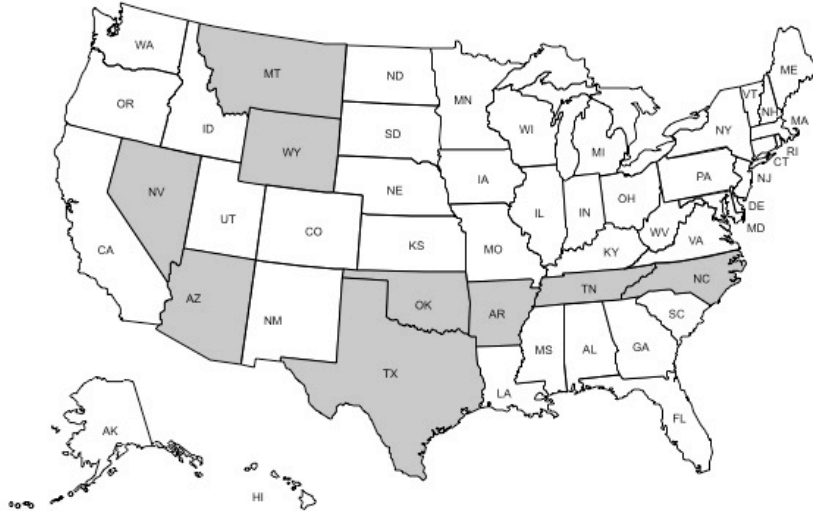
⁹⁵ In recognition of this point, traditional perpetuities law treats the original donor as still controlling the property, and not the holder of the power, if the power cannot be exercised in favor of the holder of the power. *See* Dukeminier & Sitkoff, *supra* note __, at 909-11.

⁹⁶ *See* Nenno, *supra* note __, at 333-47; *see also* Dukeminier & Sitkoff, *supra* note __, at 902-03 (“Model forms for perpetual trusts typically include a provision that gives each generation a nongeneral power to appoint the remainder to the next generation outright or in further trust.”); Bridget J. Crawford, Commentator, *Who is Afraid of Perpetual Trusts?*, 111 Mich. L. Rev. First Impressions 79, 86 (2012) (“[W]ith many perpetual trusts, each generation of beneficiaries will have the ability to decide whether to continue the trust or not.”).

⁹⁷ *See* Restatement (Third) of Property: Wills and Other Donative Transfers §24.4 cmt. c (2011); *infra* note 208 and text accompanying.

⁹⁸ Gray reached the same conclusion. *See* Gray, *supra* note __, at §731, p. 670.

Constitutional Perpetuities Bans (2013)



A. First Generation

North Carolina was the first state to adopt a constitutional ban on perpetuities.⁹⁹ It did so in December of 1776 in the following provision of the state’s Declaration of Rights: “[P]erpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed.”¹⁰⁰ Tennessee in 1796, Florida in 1838, and Wyoming in 1889 adopted nearly identical provisions.¹⁰¹ Each remains in force today, except for the Flori-

⁹⁹ For a suggestion of why North Carolina was the only of the original thirteen colonies to have such a provision in its constitution, see Joshua C. Tate, *Perpetuities and the Genius of a Free State*, 67 Vand. L. Rev. __ (forthcoming 2014). Tate argues that, although “the policy reasons that justified a ban on perpetuities were known to all the colonists, they were more salient for the constitutional delegates North Carolina in 1776 because of their recent experience of instability caused by the hereditary title of an absentee English lord.” *Id.* at __.

¹⁰⁰ N.C. Const. of 1776, Declaration of Rights § 23. The current version in North Carolina substitutes “shall not” for “ought not to,” but otherwise is identical. *See* N.C. Const. art. I, § 34. For general background on the North Carolina Constitution of 1776, see Orth & Newby, *supra* note __, at 2-12.

¹⁰¹ The Florida provision is a verbatim copy of the original North Carolina provision. *See* Fla. Const. of 1838, § 24. The Tennessee and Wyoming provisions are substantively identical but substitute “shall not” for “ought not to.” *See* Tenn. Const. of 1796, § 23 (“That perpetuities & monopolies are contrary to the Genius of a free State and shall not be allowed”); Wyo. Const. of 1889, § 30 (“Perpetuities and monopolies are contrary to the genius of a free state, and shall not be allowed.”).

da provision, which was dropped from the state's new constitution in 1868.¹⁰² Given the timing, that omission surely was unrelated to the perpetual trust movement, which arose more than a century later.¹⁰³

In structure, the first-generation constitutional bans on perpetuities resemble the Thirteenth Amendment to the federal Constitution in two respects. First, like the Thirteenth Amendment, which establishes a categorical ban on "slavery" without regard for state action,¹⁰⁴ the first-generation perpetuities bans are categorical and not limited to governmental action. As has been held regarding the Thirteenth Amendment, the first generation perpetuities bans therefore appear to pertain to both state action and private conduct,¹⁰⁵ and indeed the case law that has arisen under the bans is in accord.¹⁰⁶ Second, just as the proscription of "slavery" is unaccompanied by definition and so has been construed by courts in light of text, history, and purpose,¹⁰⁷ so too the state constitutional perpetuities bans do not define "perpetuities," leaving the matter to be resolved by courts as a matter of constitutional interpretation.

So what is a perpetuity within the contemplation of these provisions? It seems clear that the term "perpetuities" references the entailment of property for at least three reasons. First, "perpetuities" appears twice in the 1776 North Carolina constitution – first in the Declaration of Rights, in the provision at issue, and again in the structural provisions. This further provision states that "the future legislature of this State shall regulate entails, in such a manner as to prevent perpetuities,"¹⁰⁸ implying that the former gives rise to the latter.¹⁰⁹ Similar provisions commanding legislation to regulate entails so as to prevent perpetuities appeared in the contemporaneous constitutions of Pennsylvania (1776) and Vermont (1777).¹¹⁰

¹⁰² See 1 Richard T. Ely, *Property and Contract in Their Relations to the Distribution of Wealth* 467 (1914) ("The Florida Constitution of 1838 and also that of 1865 have the North Carolina provision, but the Constitution of 1868 dropped it.").

¹⁰³ Florida did not allow long-enduring trusts by statute until 2000. See *An Act Relating to Trusts*, June 7, 2000, 2000 Fla. Sess. Law Serv. Ch. 2000-245, § 1 (extending the perpetuities period for trusts created after December 31, 2000 to 360 years).

¹⁰⁴ "Neither slavery nor involuntary servitude, except as a punishment for crime wherof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, §1.

¹⁰⁵ Laurence H. Tribe, *American Constitutional Law* § 5-15, at 924-25 (3d ed. 2000).

¹⁰⁶ See *infra* Part V.B.1.

¹⁰⁷ See, e.g., *Palmer v. Thompson*, 403 U.S. 217, 226-27 (1971)

¹⁰⁸ N.C. Const. § 43 (1776).

¹⁰⁹ Amar calls this mode of interpretation intratextualism. See Akhil Reed Amar, *Intratextualism*, 112 *Harv. L. Rev.* 747 (1999).

¹¹⁰ See *Vt. Const. of 1777*, chp. II, § 34 ("The future legislature of this State, shall regulate entails, in such manner as to prevent perpetuities."); *Penn. Const. of 1776*, chp. II, § 37 ("The future legislature of this state, shall regulate intails in such a manner as to prevent perpetuities."). Today, only Vermont retains such a provision. See *Vt. Const. chp. II, § 63* ("The Legislature shall regulate entails in such manner as to prevent perpetuities.").

Second, the word “perpetuity” was a legal term of art in 1776, defined in contemporary law dictionaries as an entail or its functional equivalent. A 1750 dictionary, for example, defined perpetuity as “when an Estate is designed to be so settled in Tail, &c. that it cannot be undone or made void; as where if all the Parties who have Interest join, they cannot bar or pass the Estate.”¹¹¹ Another dictionary, published in 1792, is to similar effect: “Perpetuity is, where if all that have interest join in the conveyance, yet they cannot bar or pass the estate; for if, by concurrence of all having interest, the estate may be barred, it is no perpetuity.”¹¹² Moreover, the first edition of Blackstone’s *Commentaries*, published ten years prior to the adoption of the 1776 North Carolina constitution, describes a perpetuity as “the settlement of an interest, which shall go in the succession prescribed, without any power of alienation.”¹¹³ Together, these sources lend support to Gray’s conclusion that “[t]he natural, the original, meaning of a perpetuity is an inalienable, indestructible interest.”¹¹⁴

Third, that the term “perpetuity” includes functional as well as formal entails is evident from the history of the Rule Against Perpetuities. As we have seen, the Rule was fashioned to prevent a resurrection of the entail by “ingenious person[s]” via an endless series of indestructible contingent future interests.¹¹⁵ The first cases to use the term perpetuity, decided in the 1590s, recognized this equivalence.¹¹⁶ In the *Duke of Norfolk’s Case*, decided in 1682, nearly a century before adoption of the North Carolina constitution of 1776, Lord Chancellor Nottingham said that a perpetuity involved “the settlement of an estate or interest in tail, with such remainders expectant upon it, as are in no sort in the power of the legal tenant in tail in possession to dock by any recovery or assignment.”¹¹⁷ By 1732, in *Stanley v. Leigh*, the term “perpetuity” was described as “a legal word or term of art” meaning “the limiting [of] an estate . . . in such manner as would render it unalienable longer than for a life or lives in being at the same time, and some short or reasonable time after.”¹¹⁸

B. Second Generation

¹¹¹ Giles Jacob, *A New Law Dictionary* 73 (6th ed., 1750). It continues, “but if by the Concurrence of all having the Estate-tail, it may be barred, it is no Perpetuity.” *Id.* See also *The Student’s Law Dictionary*; or *Compleat English Law-Expositor* (1740) (“is used where an Estate is intended so to be settled in Tail, &c. that it cannot possibly be undone or made void, a Thing our Law will not bear, and on that Account all Perpetuities are avoided”); *Termes de la Ley* (1721) (“where an estate is so designed to be settled in tail, etc., that it cannot be undone or made void”)

¹¹² 2 Richard Burn & John Burn, *A New Law Dictionary* 205 (1792).

¹¹³ Blackstone, *supra* note __, at *174.

¹¹⁴ Gray, *supra* note __, at § 140 (internal quotation marks removed).

¹¹⁵ See *supra* note __ and text accompanying.

¹¹⁶ See *supra* note __ and text accompanying.

¹¹⁷ See *supra* note __ and text accompanying.

¹¹⁸ See *supra* note __ and text accompanying.

The second generation of constitutional perpetuities bans uses almost identical language to that of the first, with one substantive addition. This generation begins with the 1836 Constitution of the Republic of Texas, which provides, “Perpetuities or monopolies are contrary to the genius of a free government, and shall not be allowed; *nor shall the law of primogeniture or entailments ever be in force in this Republic.*”¹¹⁹ The only difference between this provision and the North Carolina model is the italicized language that bars primogeniture and entailments. Arkansas in 1874 and Oklahoma in 1907 adopted constitutional perpetuities bans substantially similar to the Texas model.¹²⁰

The history of the Texas provision provides strong evidence of a connection to the first generation. The first proposed Texas Constitution, while it was still part of the Mexican state of Coahuila y Tejas, followed the North Carolina model precisely, without any mention of primogeniture: “Perpetuities and monopolies are contrary to the genius of a free government, and shall not be allowed.”¹²¹ The additional bar on primogeniture and entailments was added without substantive discussion in 1836, probably modeled on Spain’s then-recent abolishment of entailments.¹²² Primogeniture was resisted by the colonists for many of the same anti-aristocratic reasons that they resisted the entail.¹²³

C. Third Generation

The third generation begins with California’s 1849 Constitution. The California text differs from those of the first two generations in that it does not include a reference to monopolies or to the genius of a free state. Instead, it provides simply that, “No perpetuities shall be allowed except for eleemosynary purposes.”¹²⁴ Nevada in 1864 and

¹¹⁹ Tex. Const. of 1836, Declaration of Rights § 17 (emphasis added). See also J.E. Ericson, Origins of the Texas Bill of Rights, 62 Sw. Hist. Q. 457, 460 (1959) (noting that the new Texas provision “included also prohibitions against the English common law practices of primogeniture and entailment, not to be found in American constitutions of that time”). From 1836 to 1845, Texas was an independent sovereign. See generally David P. Currie, The Constitution of the Republic of Texas: Part 1 of 2, 8 Green Bag 2d 145 (2005) (providing background on the Republic of Texas’s constitution).

¹²⁰ The Arkansas and Oklahoma versions have minor, non-substantive textual variations. See Ark. Const. of 1874, art. II, § 19 (“Perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed; nor shall any hereditary emoluments, privileges or honors ever be granted or conferred in this State.”); Okla. Const. of 1907, art. II, § 32 (“Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primo geniture or entailments ever be in force in this State.”).

¹²¹ Constitution or Form of Government of the State of Texas, art. XIX (Proposed 1833), available at <http://tarlton.law.utexas.edu/constitutions/texas1833>.

¹²² See Ericson, *supra* note __, at 460; see also Gortario v. Cantu, 7 Tex. 35, 46-47 (1851). Ericson suggests that either Maryland or North Carolina may have been the original model for the perpetuities prohibition, *id.*, but Maryland’s Constitution prohibited only monopolies and not also perpetuities. See Md. Const. of 1776, Decl. of Rights art. XXXIX (1776) (“That monopolies are odious, contrary to the spirit of a free government, and the principles of commerce; and ought not to be suffered.”). Tate observes that “at least one-third of the framers of the 1836 Constitution of the Republic of Texas were likely to have been directly or indirectly familiar with the language of the North Carolina provision.” Tate, *supra* note __, at __n.1.

¹²³ See *infra* note __ and text accompanying.

¹²⁴ Cal. Const. of 1849, art. XI, § 16.

Montana in 1889 followed California's lead, though Montana's version substitutes the plainer term "charitable" for "eleemosynary."¹²⁵ California repealed its provision in 1970,¹²⁶ though (as in Florida) apparently not in an effort to extend trust duration.¹²⁷

The link between California and prior generations of constitutional perpetuities bans is not obvious based on text alone. However, the records of the convention at which California's provision was first adopted suggest a connection. When a perpetuities ban was first proposed, the text was: "That perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed; nor shall any hereditary emoluments, privileges, or honors, ever be conferred in this State."¹²⁸ This language closely tracks the earlier generations of constitutional prohibitions, reflecting the original North Carolina model (the "genius of a republic") plus the second generation's additional ban on primogeniture. The convention rejected this proposal, but not on substantive grounds—it was thought to be out of place in the section in which it was proposed.¹²⁹ When the prohibition was later suggested for inclusion in a different portion of the constitution, it was adopted without dissent in the simpler form quoted in the prior paragraph.¹³⁰

D. Fourth Generation

Arizona's 1911 constitutional perpetuities ban marks a fourth generation. Arizona's version, which has not been copied elsewhere, provides: "No hereditary emoluments, privileges, or powers shall be granted or conferred, and no law shall be enacted permitting any perpetuity or entailment in this State."¹³¹ The combination of perpetuities with entailment is familiar from the earlier generations, but the structure of this provision is unique. It provides that "no law shall be enacted," whereas no other provision is

¹²⁵ See Nev. Const. of 1864, art. XV, § 4 ("No perpetuities shall be allowed except for eleemosynary purposes."); Mont. Const. of 1889, art. XIX, § 5 ("No perpetuities shall be allowed, except for charitable purposes.").

¹²⁶ See West's Ann. Cal. Const. art. 20, § 9 (noting repeal as of Nov. 3, 1970); see also Orth, *supra* note __, at 405 n.29.

¹²⁷ In 1991, California adopted USRAP, see Uniform Statutory Rule Against Perpetuities, 1991 Cal. Legis. Serv. Ch. 156 (A.B. 1577), and even today it does not permit perpetual trusts. See Cal. Prob. Code § 21205.

¹²⁸ See J. Ross Browne, Report of the Debates in the Convention of California on the Formation of the State Constitution in September and October, 1849, at 46 (provision submitted by Mr. Ord).

¹²⁹ See *id.* ("Mr. Halleck thought the subject properly came in another part of the Constitution."); *id.* at 47 ("Mr. Jones considered the proposed section one of much importance. . . . But a declaration of the genius of a Republic in relation to those equal rights which we claim for all citizens, would come more appropriately in the bill of rights."); see also Gerdes, *supra* note __, at 92 n.48.

¹³⁰ See Browne, *supra* note __, at 272 (reporting on proposal and its justification thus: "It is to prevent perpetuity of lands from families to families. It is upon perpetuities that aristocracies are built up."); Gerdes, *supra* note __, at 92. The exception for "eleemosynary purposes" was added later in the convention. See Browne, *supra* note __, at 376 (reporting amendment without substantive discussion); Gerdes, *supra* note __, at 92 n. 48.

¹³¹ Ariz. Const. of 1911, art. II, § 29.

so expressly directed at the legislature. Moreover, no other state pairs a perpetuities ban with similar prohibitions of “emoluments, privileges, or powers.”

Despite these unique features, the historical evidence suggests that Arizona’s prohibition derives from the North Carolina original.¹³² The United States took most of the territory that would become Arizona in 1848, at the end of the Mexican-American War,¹³³ and bought the remainder as part of the Gadsden Purchase of 1853.¹³⁴ At that time, Arizona was part of the Territory of New Mexico.¹³⁵ In an Act of July 12, 1851, the Territory adopted a Bill of Rights that included a perpetuities ban that followed Texas’s second-generation model: “Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailment ever be in force in this Territory.”¹³⁶ That prohibition became the law of the newly formed Territory of Arizona in 1863.¹³⁷ Thus, although Arizona’s first Constitution in 1911 adopted different text, the territory had been operating for over fifty years under a perpetuities ban in its fundamental law that can be traced back to North Carolina.¹³⁸

E. Summary

Figure __ summarizes the four generations of constitutional perpetuities provisions.

¹³² See, e.g., John D. Leshy, *The Arizona State Constitution* 103 (2d ed. 2013) (“This provision . . . was taken from earlier state constitutions that were closer in time to the practices of aristocracy and nobility it condemns. . . . It endorses the democratic ideal of a free society providing equal opportunity for all, including each succeeding generation.”).

¹³³ See *id.* at 3-4 (“Most of the area now within the state was acquired by the United States in 1848 in the Treaty of Guadalupe Hidalgo that ended the war with Mexico.”).

¹³⁴ Leshy, *supra* note __, at 4 (noting that (roughly) the southern quarter of the state “was acquired from Mexico in the Gadsden Treaty of 1853”).

¹³⁵ Leshy, *supra* note __, at 4 & n.4.

¹³⁶ Act Declaring and Establishing the Rights of the People of the Territory of New Mexico, July 12, 1851, § 17, in H. Misc. No. 4, 32d Cong., 1st Sess., at 31, available at <http://books.google.com/books?id=ApQtAAAAYAAJ&lpg=PA32&ots=nDCbbMP39V&dq=Act%20of%20July%2012%2C%201851%20new%20mexico%20perpetuities&pg=PP1#v=onepage&q&f=false>; see also Richard R. Powell, *Perpetuities in Arizona*, 1 Ariz. L. Rev. 225, 233 (1959).

¹³⁷ Act to Provide a Temporary Government for the Territory of Arizona, Feb. 24, 1863, 12 Stat. 664, § 2 (“all legislative enactments of the Territory of New Mexico not inconsistent with the provisions of this act, are hereby extended to and continued in force in the said Territory of Arizona”); see Powell, *supra* note __, at 233.

¹³⁸ See also Powell, *supra* note __, at 233 (noting “earlier appearances of similar language in the constitutions of Florida, North Carolina, and Tennessee”).

Figure __: Four Generations of Constitutional Perpetuities Bans

Clause	States
“Perpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed.”	North Carolina (1776), Tennessee (1796) Florida (1838, repealed 1868), Wyoming (1889)
“Perpetuities or monopolies are contrary to the genius of a free government, and shall not be allowed, nor shall the law of primogeniture or entailments ever be in force in this Republic.”	Texas (1836), Arkansas (1874), Oklahoma (1907)
“No perpetuities shall be allowed except for eleemosynary purposes.”	California (1849, repealed 1970), Nevada (1864), Montana (1889)
“No hereditary emoluments, privileges, or powers shall be granted or conferred, and no law shall be enacted permitting any perpetuity or entailment in this State.”	Arizona (1911)

IV. Perpetuities As Constitutional Policy

We are now in a position to consider the scope, purpose, and policy of the state constitutional prohibitions of “perpetuities.” Our aim is to put these provisions in historical and functional context by looking at the contemporaneous policy rhetoric and common law (a) as a general matter, (b) in relation to the North Carolina provision, and (c) in relation to the others.

A. Purposes and Policies

In proscribing “perpetuities,” with that term understood to mean property arrangements that create an unbarrable entail “in whatever guise it appeared,”¹³⁹ the framers of the state constitutions appear to have had a functional problem in mind. Accordingly, to give content to the proscription, it is useful to consider more closely the nature of that functional problem. What is it about perpetuities that makes them “contrary to the genius of a free state,” warranting a constitutional provision appearing alongside the right to due process and trial by jury?¹⁴⁰ The historical sources support three overlapping answers: (1) ensuring marketable title, (2) protecting against changed circumstances, and (3) avoiding concentrations of wealth and power.

¹³⁹ See supra note __ and text accompanying.

¹⁴⁰ See N.C. Const. of 1776, Decl. of Rights § 9 (“That no freeman shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men, in open court, as heretofore used.”); *id.* § 12 (“That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the law of the land.”).

1. Marketable Title

Numerous authorities contemporary to the 1776 North Carolina constitution denounce perpetuities on marketable title grounds. A common view was that perpetuities “tend[] to put a stop to commerce, and prevent the circulation of the property of the kingdom.”¹⁴¹ Perpetuities “would be a bar to Industry and Commerce; the Cultivation of Lands; and the Improvement of Estates: to which I need not say a freedom of charging or conveying Property is absolutely necessary.”¹⁴² As such, “the Law will not allow [property] to be tied up from alienation, that is the Perpetuity which the Law abhors.”¹⁴³ This line of thinking can be traced back to the *Duke of Norfolk’s Case*, in which Lord Chancellor Nottingham remarked that entails acted as “perpetual clogs upon the estate.”¹⁴⁴

2. Changed Circumstances

Another historical justification for limiting perpetuities is the limits of foresight and the problem of changes in circumstances. Brian Simpson put the point thus: “given that one can, to a limited extent only, foresee the future and the problems it will generate, landowners should not be allowed to tie up lands for periods outside the range of reasonable foresight.”¹⁴⁵ This strand of thought, too, traces back to the *Duke of Norfolk’s Case*. When asked, “Where will you stop, if you do not stop here?,” Nottingham replied, “I will tell you where I will stop: I will stop where-ever any visible Inconvenience doth appear.”¹⁴⁶

The role of perpetuities law in protecting against changed circumstances was well-recognized by 1776. Blackstone explained that “courts of justice will not indulge even wills, so as to create a perpetuity, which the law abhors: because by perpetuities ... estates are made incapable of answering those ends, of social commerce, and providing for the sudden contingencies of private life, for which property was at first established.”¹⁴⁷ Another contemporary treatise observed that “it is against the nature of hu-

¹⁴¹ 2 Richard Burn & John Burn, *A New Law Dictionary* 205 (1792); see also 2 Edward Wynne, *Eunomos: Or, Dialogues Concerning the Law and Constitution of England* 128-29 (London 1768) (Perpetuities “would be a bar to Industry and Commerce . . . [to which] a freedom of charging or conveying Property is absolutely necessary.”); Geoffrey Gilbert, *The Law of Devises, Last Wills, and Revocations* 118*-19 (3d ed. 1773) (“Perpetuity, as it is a legal term of art, is the limiting an estate of inheritance, or for years, so as to render it unalienable longer than for a life or lives in being at the same time, and some short or reasonable time after. It is a thing odious in the law and destructive to the commonwealth; – it would put a stop to the commerce, and prevent the circulation of the property of the kingdom.”).

¹⁴² 2 Wynne, *supra* note __, at 128-29.

¹⁴³ *Id.* at 127.

¹⁴⁴ 3 Chan. Cas. at 31.

¹⁴⁵ A.W.B. Simpson, *Legal Theory and Legal History* 159-160 (1987).

¹⁴⁶ 22 Eng. Rep. at 960; 3 Chan. Cas. at 49.

¹⁴⁷ Blackstone, *supra* note __, at *174.

man affairs so to settle an estate in a family, that on contingency or revolution of fortune the owner shall have *no* power over it.”¹⁴⁸

3. Concentrations of Wealth and Power

In the founding era, in which land was the primary form of wealth, ownership of land came with political power. As John Adams wrote, “the Balance of Power in a Society, accompanies the Balance of Property in Land. The only possible Way then of preserving the Balance of Power on the side of equal Liberty and public Virtue is to make the Acquisition of Land easy to every Member of Society.”¹⁴⁹ On this view, dynastic and aristocratic concentrations of wealth (read: land) would lead to a kind of corruption of republican political values.¹⁵⁰ Accordingly, commentators writing around the time of the North Carolina constitution argued that perpetuities should be banned to prevent such concentrations. The animating policy value was liberty, not egalitarianism.

For example, a few years before the North Carolina constitution, one commentator wrote that perpetuities “are absolutely inconsistent with the temper of a free Government by lodging too much power in a few individuals.”¹⁵¹ A newspaper political commentary published a few years later, in 1804, elaborates:

Is not an equal distribution of property, then essential to Republican freedom?

If you mean an equal distribution of property, on the principles of an Agrarian law, it is not; for such distinction is unjust, it confounds the right of property, cuts the sinews of industry, and gives power to those who will certainly abuse it. But, if by equal distribution of property you mean a system of law to prevent perpetuities, and to brake down the estates of deceased persons by dividing them out in equal portions to the heirs, it is.¹⁵²

As Gregory Alexander has explained, “the device that American republican lawyers who despised English landed aristocracy associated most closely with the landed English family dynasty was the entailment of land. . . . American legal writers’ republican concern for corruption prompted their hatred of primogeniture and especially of entailments of land, which appeared to be the most glaring vestiges of a corrupt past.”¹⁵³

¹⁴⁸ Gilbert, *supra* note __, at 54.

¹⁴⁹ See Letter from John Adams to James Sullivan, May 26, 1776, in 4 Papers of John Adams 208, 210 (Robert J. Taylor, ed. 1979).

¹⁵⁰ See Gregory S. Alexander, Time and Property in the American Republican Legal Culture, 66 N.Y.U. L. Rev. 273, 294-96 (1991); Wood, *supra* note __, at 182-84. Tate points to evidence that some of the delegates to the North Carolina constitutional convention were instructed specifically to “oppose everything that leads to aristocracy.” Tate, *supra* note __, at __ (quotations and citations omitted).

¹⁵¹ 2 Wynne, *supra* note __ at 128.

¹⁵² From the Balance: Political Catechism, Alexandria Daily Advertiser, vol. 4, issue 924, at 2 (Alexandria, VA Mar. 6, 1804).

¹⁵³ Alexander, *supra* note __, at 296, 298; see also Sheldon F. Kurtz, Moynihan’s Introduction to the Law of Real Property 55 (5th ed. 2011) (Opposition to the fee tail “developed in the post-revolutionary era on the

Sir Arthur Hobhouse long ago remarked that dead hand control over the disposition of property sometimes reflects “motives of reasonable prudence.”¹⁵⁴ In those cases, the policy concern is with staleness arising from changes in circumstances. Other dead hand control reflects “ambition[] or the love of power.”¹⁵⁵ It is this latter kind of dynastic impulse, involving concentration of wealth and power within a family line, that is at issue here. The notion is that perpetuities are antithetical to a free state because they lead to dynastic concentrations of wealth and therefore of political power, threatening liberty.

B. The North Carolina Constitution

Although commentators resisted perpetuities on the grounds of alienability of land, changes in circumstances, and unjustified concentrations of wealth and political power, it appears that the framers of the North Carolina prohibition were concerned primarily with unjustified concentration of wealth and political power.

To begin with, the text itself proscribes perpetuities because they are “contrary to the genius of a free state.”¹⁵⁶ Like “perpetuity,” “free state” was a term in common usage at the time. A free state was one in which the people govern, in contrast to any form of despotic regime.¹⁵⁷ John Adams, for example, said that “there can be no constitutional liberty, no free state, no right constitution of a commonwealth, where the people are excluded from the government.”¹⁵⁸ This distinction between a free state and despotism appears also in writings by Montesquieu, Blackstone, and other writers with whom the drafters of state constitutions would be familiar.¹⁵⁹ By invoking the “free state,” the framers were taking a stand in favor of liberty and against aristocracy and unjustified

ground that it was incompatible with American social conditions. This opposition arose ... partly from the employment of the fee tail in England as a legal device to keep ancestral lands in the family for use as a basis of social and political power.”); Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 Harv. L. Rev. 358, 394-96 (2006) (discussing “the belief that the vestiges of feudalism—in particular, primogeniture and the entail, were incompatible with a republican form of government”). The framers’ aversion to the “inequalities and dependencies of the feudal system” is well-represented by John Adams, *A Dissertation on the Canon and the Feudal Law*, Boston Gazette, Aug. 12, 1765, reprinted in 1 *The Papers of John Adams* 111, 128 (R. Taylor, M. Kline & G. Lint eds. 1977). Adams worried, for example, that there was a “design on foot, to enslave all America,” and to “subvert[t] the whole system of our Fathers, by an introduction of the cannon and feudal law, into America.” *Id.* at 127.

¹⁵⁴ Hobhouse, *supra* note __, at 189.

¹⁵⁵ *Id.* at 188.

¹⁵⁶ N.C. Const. of 1776, Decl. of Rights § 23

¹⁵⁷ Eugene Volokh discusses this at length in connection with the Second Amendment’s reference to the “security of a free State,” U.S. Const. amend. II, in Eugene Volokh, *Necessary to the Security of a Free State*, 83 Notre Dame L. Rev. 1 (2007), on which we have relied for the references discussed above.

¹⁵⁸ *See id.* at 29 (quoting 3 John Adams, *A Defence of the Constitutions of Government of the United States of America* 361 (Philadelphia, William Cobbett 1797)).

¹⁵⁹ *See id.*

concentrations of power. The “genius” of a free state is that political power is broadly distributed among the citizenry.¹⁶⁰

The statute passed by the state legislature in 1784 to implement the state’s constitutional directive to “regulate entails, in such a manner as to prevent perpetuities” provides further evidence that the North Carolina framers were concerned with unjustified concentration of power.¹⁶¹ Just as the First Judiciary Act informs our understanding of Article III of the U.S. Constitution,¹⁶² North Carolina’s Act of 1784 is suggestive about the likely meaning of “perpetuities” in the North Carolina Constitution. The preamble to the relevant provision of that Act, which transformed fee tails into fee simple, provided as follows:

[W]hereas entails of estates tends only to raise the wealth and importance of particular families and individuals, giving them an unequal and undue influence in a republic, and prove in manifold instances the source of great contention and injustice¹⁶³

Notice the specific indictment of perpetuities as giving families “unequal and undue influence in a republic.”¹⁶⁴ Less than forty years later, the state supreme court inferred from this language the purpose of preventing the accumulation of individual wealth:

In obedience to the declaration of the Bill of Rights, and to the injunction in the Constitution, the Legislature of 1784 abolished entails – giving as a reason that they tended to raise the wealth and importance of particular families, and to give

¹⁶⁰ Orth and Newby suggest that “genius” here refers to “special character,” Orth & Newby, *supra* note __, at 90, which is consistent with its latin origins. See also, e.g., Orth, *supra* note __, at 401 n.9; Anthony T. Kronman, The Genius of Charles Black, 111 Yale L.J. 1931 (2002) (“In Latin, the word genius refers to the specialness of a person or place, its distinctive presiding spirit, the thing that makes it different from all others – its own unique self, which the Romans sometimes thought of as a god, the resident divinity that gives a person or place what we might call its special character.”).

¹⁶¹ See *supra* note __ and text accompanying; see also John V. Orth, Does the Fee Tail Exist in North Carolina?, 23 Wake Forest L. Rev. 757 (1988) (“In 1784, the General Assembly finally discharged its constitutional mandate and adopted the original of the statute still in force.”).

¹⁶² See William R. Casto, The First Congress’s Understanding of Its Authority Over the Federal Courts’ Jurisdiction, 26 B.C. L. Rev. 1101 (1985); Richard H. Fallon, Jr., The Ideologies of Federal Courts Law, 74 Va. L. Rev. 1141, 1219 (1988); see also *Cohens v. State of Virginia*, 19 U.S. 264, 420 (1821) (“A contemporaneous exposition of the constitution . . . is the judiciary act itself. We know that in the Congress which passed that act were many eminent members of the Convention which formed the constitution.”).

¹⁶³ N.C. Act of 1784, ch. 22, § 5, reprinted in 24 State Records of North Carolina 574 (W. Clark ed. 1905). Orth argues that the Act has not actually eliminated the fee tail in North Carolina, at least as a future interest. See Orth [Fee Tail], *supra* note __, at 795.

¹⁶⁴ Orth likewise connects this language to the phrase in the Declaration of Rights that perpetuities are “contrary to the genius of a free state.” Orth, *supra* note __, at 402; see also Tate, *supra* note __, at __ (“Many of those who fought to free themselves from British colonial rule were driven, at least in part, by a desire to strike out against familial influence, patronage, hierarchy, and the other trappings of a hereditary aristocracy.”).

them an undue influence in a republic. This shows plainly that they designed to prevent the accumulation of individual wealth.¹⁶⁵

That the North Carolina constitutional proscription of perpetuities is aimed at unjustified concentrations of wealth and power is still further suggested by the connection between “perpetuities” and “monopolies,” as both are declared to be contrary to the genius of a free state.¹⁶⁶ Monopolies were reviled by the Framers on republican political (rather than efficiency) grounds. Madison, for example, said that a government that lets “monopolies deny to part of its citizens that free use of their faculties” is not a “just government” but “despotism.”¹⁶⁷ Madison also identified a common political thread between monopolies and perpetuities. He wrote that the problem with monopolies is that the benefit is “confined to one or a few,” and that “[t]he evil of an excessive & dangerous cumulation of landed property in the hands of individuals is best precluded by the prohibition of entails, by the suppression of the rights of primogeniture, and by the liability of landed property to the payment of debts.”¹⁶⁸

C. The Other State Constitutions

As we have seen, the other ten state constitutional provisions proscribing perpetuities appear to derive from the North Carolina Constitution.¹⁶⁹ This common origin suggests a common purpose. To be sure, the world changed between 1776 and 1911, when the last of these constitutional provisions was adopted. But those changes strengthen the case for these provisions being targeted at functional entails so as to avoid unjustified concentrations of wealth and political power. Most obviously, several

¹⁶⁵ Griffin v. Graham, 8 N.C. 96, 131 (1820).

¹⁶⁶ See Gordon S. Wood, *The Radicalism of the American Revolution 185-86* (1992) (citing the North Carolina provision as an illustration of republican distaste for “special privileges”).

¹⁶⁷ James Madison, “Political Essay: Property,” Mar. 29, 1792, in *Selected Writings of James Madison*, at 222, 224 (Ralph Ketcham ed., 2006). In 1787, George Mason refused to support the proposed new federal Constitution in part because he thought the necessary and proper clause would empower Congress to “grant monopolies in trade and commerce.” George Mason, “Objections to the Constitution,” Oct. 1787, in *1 Birth of the Bill of Rights: Encyclopedia of the Antifederalists*, at 233, 234 (Jon L. Wakelyn ed., 2004). Several state ratifying conventions likewise recommended an amendment to bar federal grants of private monopolies. See, e.g., Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause As an Absolute Constraint on Congress*, 2000 U. Ill. L. Rev. 1119, 1150 & n. 253 (2000).

¹⁶⁸ James Madison, *Detached Memoranda, 1819?*, in *James Madison: Writings*, at 745, 757 (Jack N. Rakove ed., 1999). The connection between perpetuities and monopolies, and their tendency toward concentrations of wealth and political power, can be traced back to the 1624 English Statute of Monopolies, better known as the first patent statute. See Orth & Newby, *supra* note __, at 90. Indeed, the language of the Statute of Monopolies, which proclaims that monopolies are “altogether contrary to the laws of this realm, and so are and shall be utterly void and of none effect,” may have provided a model for the North Carolina prohibition. 21 Jac. I, ch. 3 (1623-24), reprinted in Thomas Turner, *The Law of Patents and Registration*, at 115 (1851).

¹⁶⁹ See *supra* Part III.

of the constitutional bans on perpetuities were adopted even after it became clear that the fee tail, the formal entail, would not take root in America.¹⁷⁰

Moreover, textual variations in the later constitutions point in particular to anti-aristocratic worry about dynastic concentrations of wealth. Four of the seven provisions that depart from the North Carolina text include specific reference to the apparatus of the English aristocracy, such as primogeniture and hereditary emoluments.¹⁷¹ For example, the Texas constitution provides that perpetuities “shall not be allowed, nor shall the law of primogeniture or entailments ever be in force in this Republic.”¹⁷² Arizona’s constitution says, “No hereditary emoluments, privileges, or powers shall be granted or conferred, and no law shall be enacted permitting any perpetuity or entailment in this State.”¹⁷³ Because these provisions combine the bar on perpetuities with other anti-aristocratic rules, it seems unlikely that they were aimed merely at the problems of marketable title or changed circumstances. Primogeniture in particular was commonly lumped together with the entail in early American thought as twin evils that “perpetuate an undesirable social and political class.”¹⁷⁴

The California provision, followed by Nevada and Montana, does not add anti-aristocratic language, but it appears to have been motivated by the same policy concern. When the California provision was first introduced in convention, its sponsor explained its intended purpose thus: “It is to prevent perpetuity of lands from families to families. It is upon perpetuities that aristocracies are built up. Democracy would soon be overturned if this was allowed.”¹⁷⁵ This bit of legislative history would seem to confirm what the text and history imply¹⁷⁶—namely, that the state constitutional bans on perpetuities share not only common origins but also a common purpose. And that purpose is to pre-

¹⁷⁰ Alexander, *supra* note __, at 297 (“[T]he institutions of primogeniture and the entailment never really took root in American law.”); Percy Bordwell, English Property Reform and Its American Aspects, 37 Yale L.J. 179, 192 (1927) (“That the fee tail ever had any real vitality in the United States, even in colonial times, may well be doubted.”); *see also* Restatement (Third) of Property: Wills and Other Donative Transfers §24.4 (2011) (“The fee tail estate is not recognized in American Law.”).

¹⁷¹ *See supra* Figure __ (Texas, Arkansas, Oklahoma, and Arizona). North Carolina’s Constitution bars hereditary emoluments in a separate provision, N.C. Const. of 1776, Declaration of Rights § 22 (“no hereditary emoluments, privileges, or honors ought to be granted or conferred in this State”), and the U.S. Constitution similarly forbids titles associated with aristocracy, U.S. Const. art. I, § 9 (“No Title of Nobility shall be granted by the United States”).

¹⁷² Tex. Const. of 1836, Declaration of Rights § 17.

¹⁷³ Ariz. Const. of 1911, art. II, § 29.

¹⁷⁴ Primogeniture and Entailed Estates in America, 27 Colum. L. Rev. 24, 33 (1927).

¹⁷⁵ Debates in the Convention of California on the Formation of the State Constitution 272 (J. Ross Brown ed., 1850); *see also* Robert H. Gerdes, *supra* note __, at 92-93 (noting that this “quotation explains the evil that the constitution framers desired to prevent and should be considered by the courts in interpreting the meaning of the constitution”).

¹⁷⁶ Recall that the California provision finds its historical roots in the anti-aristocratic North Carolina model, and that the provision excepts charities, which is a peculiar exception if the primary purpose had been maintaining marketable title or protecting against changed circumstances.

vent unjustified, dynastic concentrations of wealth and power by way of an entail, actual or functional.

V. The Constitutionality of Perpetual Trusts

We have shown that the various state constitutional prohibitions of “perpetuities” can be traced to the North Carolina constitution of 1776. We have also shown that these provisions share the common purpose of proscribing entails, in form or function, to prevent unjustified concentrations of wealth and power in the sense of corrupting republican political values. We turn now to the practical effect of these prohibitions.

The questions we consider are several: Do the constitutional prohibitions of “perpetuities” require preservation of the common law Rule Against Perpetuities? Or can the common law Rule be reformed? If the latter, can the Rule be reformed to the extent of authorizing a perpetual (or effectively perpetual) trust? If not, should courts in states that have a constitutional ban on perpetuities refuse to enforce a perpetual trust settled in another state on the grounds that such a trust violates a strong public policy of the forum state?

Our answers to these questions focus on the purpose of the constitutional prohibitions of “perpetuities,” namely, banning entails, whether in form or in function. The provisions were meant to guard against the kinds of dynastic concentrations of wealth and political power that were associated with English aristocracy. Accordingly, we conclude that legislation authorizing perpetual or long-enduring dynasty trusts is constitutionally suspect in a state with a constitutional prohibition of perpetuities, but more modest reforms that approximate the common law Rule are permissible. We also suggest that the constitutional prohibitions might reflect the kind of strong public policy that would allow a court in a state with such a provision to refuse to apply another state’s law authorizing perpetual trusts.

A. USRAP and Other Reforms

“Today, every state has reformed the Rule in one way or another.”¹⁷⁷ We therefore begin with the question of whether any reform of the common law Rule, however modest, is permissible in a state with a constitutional ban on perpetuities. If the bans are construed as requiring Gray’s canonical statement of the common law Rule, or as freezing perpetuities law in its 1776 form, then reformation and wait-and-see, and so USRAP, would be constitutionally suspect. Such a construction would cast doubt on current practice in all nine states with a constitutional perpetuities ban, as none retains the traditional common law rule.¹⁷⁸

¹⁷⁷ Dukeminier & Sitkoff, *supra* note __, at 877; *see also* Restatement (Third) of Property: Wills and Other Donative Transfers, ch. 27, intro note, p. 554 (“Today, no state follows the common-law Rule in its pure form.”).

¹⁷⁸ Arizona and Montana have enacted USRAP, *see* Ark. Code § 18-3-101; Mont. Code § 72-2-1002, and Texas and Oklahoma have statutes permitting reformation, *see* Tex. Prop. Code §5.043; 60 Okl. St. Ann. § 75.

None of the conventional modes of constitutional interpretation, however, support construing the prohibitions so narrowly. To begin with, the text of the provisions bans “perpetuities” without specifying particular implementing rules, which suggests some legislative flexibility.¹⁷⁹ So does the further provision in the North Carolina constitution requiring “the future legislature ... [to] regulate entails, in such a manner as to prevent perpetuities.”¹⁸⁰ All that is imperative from the text is that “perpetuities” are proscribed. The constitutional command is negative rather than positive; “perpetuities” are not permitted, but no particular implementing rule is specified.¹⁸¹

In historical context, “perpetuities” was a term of art that referred to the entail “in whatever guise it appeared.”¹⁸² As we have seen, the common law of perpetuities was meant to overcome the “ingenuity of conveyancers,” who had tried to resurrect the entail by way of a series of indestructible contingent future interests.¹⁸³ The common law of perpetuities, and the Rule Against Perpetuities that emerged out of this law, was a means to that end. Other means might be equal to the task and indeed necessary as lawyers devised new forms of transfer. To be true to the teachings of history, future judges and legislatures would need leeway to refashion the law of perpetuities to cope with subsequently invented forms of transfer that might tend toward a perpetuity.

It appears that Gray reached a similar conclusion. He wrote that the constitutional bans on perpetuities “seem to be simply pieces of declamation without juristic value, at least on any question of remoteness.”¹⁸⁴ In context, Gray was not claiming that the provisions are merely hortatory, but rather that they do not adopt any particular perpetuities rule. The burden of Gray’s treatise was that the rule against remote vesting, and not any of the other common law rules that policed perpetuities,¹⁸⁵ was *the* Rule Against Perpetuities. That Gray believed these provisions to state commands of positive constitutional law, but without mandating the common law rule against remote vesting, is confirmed by his pointing to cases that applied the provisions as positive law.¹⁸⁶

The remaining five states – North Carolina, Tennessee, Nevada, Wyoming, and Arizona – authorize perpetual or effectively perpetual trusts. See *infra* note __ (collecting statutes).

¹⁷⁹ Cf. *Williams v. Florida*, 399 U.S. 78, 100 (1970) (concluding that although a jury is required, “the 12-man requirement cannot be regarded as an indispensable component” of that guarantee).

¹⁸⁰ See *supra* note __ and text accompanying.

¹⁸¹ Recall the analogy to the Thirteenth Amendment discussed in text accompanying *supra* notes __.

¹⁸² See *supra* note __ and text accompanying.

¹⁸³ See *supra* notes __ and text accompanying.

¹⁸⁴ Gray, *supra* note __, at §730, at 670.

¹⁸⁵ See Gerdes, *supra* note __, at 87 (“It was the thesis of Mr. Gray’s classic work ... that this rule presently and always did require the vesting of estates within the prescribed period and did not concern itself with the question of alienability.”). The principal other common law rules dealing with perpetuities are the rule against suspension of the power of alienation and the rule against accumulations of income. See Dukeminier & Sitkoff, *supra* note __, at 912-17.

¹⁸⁶ Gray, *supra* note __, at §730, at 670 n.8; §731, at 670-71, nn.1-2; see also *id.* §752, at 692-93.

Which brings us to the case law precedents. Although few in number, the cases suggest three points germane to the present question.¹⁸⁷ First, because the term “perpetuities” is undefined in the state constitutions, courts have looked to the common law to give it meaning. *Franklin v. Armfield*, decided by the Tennessee Supreme Court in 1854, is illustrative: “[W]hat is the perpetuity that is not to be allowed? The Constitution neither defines nor describes it; but assumes that what it is is known. We are left, then, to enquire into the common law for a proper understanding of the term.”¹⁸⁸ The court continued, “the reason of the rule against perpetuities and the reason of the policy of the law . . . [is] to destroy the entailment of estates.”¹⁸⁹ Other courts have construed the provisions similarly, looking to the common law to give meaning to the term “perpetuities.”¹⁹⁰ Thus, in *McLeod v. Dell* (1861), the Florida Supreme Court held that judicial adoption of the common law Rule was consistent with the state constitutional ban on perpetuities, because “the convention that ordained that declaration, are to be presumed to have understood the full import of the term used.”¹⁹¹

Second, consistent with *McLeod*, courts have suggested that, in the absence of implementing legislation, a constitutional ban on perpetuities is to be enforced by way of the common law Rule. In *In re McCray's Estate* (1928), the California Supreme Court took the view that “[t]he rule against perpetuities” was “ingrafted upon our system by the [state] Constitution.”¹⁹² In *Melcher v. Camp* (1967), the Oklahoma Supreme Court held that the common law Rule had been in existence in that state “from the ratification” of the state constitution, which bans “perpetuities.”¹⁹³ In *Broach v. City of Hampton* (1984), the Arkansas Supreme Court explained that, because the state constitution “forbids perpetuities” but the state “does not have a statute stating the rule against perpetuities,” the state “follows the common law rule.”¹⁹⁴ Perhaps even more on point, in *In re Gay's Estate* (1903) and *McIlvain v. Hockaday* (1904), the California Supreme Court and a Texas appellate court each held a bequest that would create a perpetual trust to be invalid as a violation of the respective state’s constitutional ban on perpetuities.¹⁹⁵

¹⁸⁷ A fourth point from the cases is that the constitutional bans that do not expressly exempt charities, such as the North Carolina provision, nonetheless do not pertain to charitable gifts. See *infra* note __ and text accompanying.

¹⁸⁸ *Franklin v. Armfield*, 34 Tenn. 305, 353 (1854).

¹⁸⁹ *Id.*

¹⁹⁰ See *Estate of Hinckley*, 58 Cal. 457, 472 (1881) (“In the absence of any legislation adopting the common law, it is probable that the courts of this State would go to the common law definitions to ascertain the meaning of the expression ‘no perpetuities shall be allowed,’ as used in the Constitution.”); *Eager v. McCoy*, 228 S.W. 709, 711 (Tenn. 1921) (“the Constitution does not define perpetuities, and we must look to the common law for the proper meaning of the term”); *City of Chattanooga v. Tennessee Elec. Power Co.*, 112 S.W.2d 385, 392 (Tenn. 1938) (following *Eager*, looking to the common law to resolve a question under the constitutional ban).

¹⁹¹ *McLeod v. Dell*, 9 Fla. 427, 447 (1861).

¹⁹² *In re McCray's Estate*, 268 P. 647, 650 (1928).

¹⁹³ *Melcher v. Camp*, 435 P.2d 107, 112 (Ok. 1967).

¹⁹⁴ *Broach v. City of Hampton*, 677 S.W.2d 851, 854 (Ark. 1984).

¹⁹⁵ *In re Gay's Estate*, 71 P. 707 (Cal. 1903); *McIlvain v. Hockaday*, 81 S.W. 54 (Tex. Civ. App. 1904).

Third, a constitutional ban on perpetuities may be satisfied otherwise than by the common law Rule, provided that the constitutional policy is still honored. In *Estate of Hinckley* (1881), the California Supreme Court put the point as follows: “It can not seriously be contended that this provision of the Constitution either prevents the Legislature from shortening the period within which estates must vest, or from making the law thus shortening such period applicable to trusts for charitable uses.”¹⁹⁶ A later decision, *In re Sahlender’s Estate* (1948), elaborated thus: “The framers were careful not to adopt any specific ‘rule,’ but to provide that ‘perpetuities’ were prohibited . . . , implying that the Legislature could regulate the rules as the needs of the times might require.”¹⁹⁷

In view of the relevant text, history, and precedents, we conclude that modest reform of the common law Rule, such as reformation and wait-and-see, is constitutional.¹⁹⁸ These reforms do nothing to extend the duration of a settlor’s control over property. Rather, they soften the what-might-happen test of the common law Rule to respect the settlor’s intent as much as possible within the conventional perpetuities period of lives in being plus twenty-one years.¹⁹⁹ In a similar vein, because USRAP’s ninety-year wait-and-see period approximates, rather than upends, the Rule’s limit on dead-hand control, it is consistent with the constitutional policy.²⁰⁰ The same is true for the two-generations perpetuities rule of the Restatement (Third) of Property.²⁰¹ Because none of these reforms has the purpose or effect of allowing the functional entailment of property through a perpetual string of life estates, none is inconsistent with the policy of the constitutional bans on perpetuities.

B. Perpetual Trust Statutes

Five of the nine states with constitutional prohibitions on perpetuities have gone further than mere reform of the common law Rule. They have enacted statutes that purport to authorize perpetual or long-enduring dynasty trusts.²⁰² Because these statutes permit entailment of property down the generations by way of a string of perpetual (or effectively perpetual) life estates, they are constitutionally suspect in a state with a constitutional ban on perpetuities.

1. Resurrecting the Entail and Concentration of Wealth

¹⁹⁶ *Estate of Hinckley*, 58 Cal. 457, 472 (1881).

¹⁹⁷ *In re Sahlender’s Estate*, 201 P.2d 69, 75 (Cal. App. 1948).

¹⁹⁸ Lynn Foster reached the same conclusion with respect to Arkansas’s adoption of USRAP. Foster, *supra* note __, at 461-62 (“Can the legislature validly enact a statutory version of the Rule? Almost certainly, yes.”).

¹⁹⁹ *See supra* Part II.B.2-3.

²⁰⁰ *Cf. Rich, Rich & Nance v. Carolina Const. Corp.*, 558 S.E.2d 77, 79-80 (N.C. 2002) (taking notice of legislative adoption of USRAP, excluding “nondonative transfers,” in spite of the constitutional ban).

²⁰¹ *See supra* Part II.B.4.

²⁰² *See* N.C. Gen. Stat. §41-23(h) (exempting trusts from the Rule); Ariz. Rev. Stat. §14-2901(A)(3) (same); Tenn. Code § 66-1-202(f) (extending the perpetuities period to 360 years); Nev. Rev. Stat. § 111.1031(1)(b) (365 years); Wyo. St. § 34-1-139(b) (1,000 years).

Recall the prototypical perpetual trust sketched earlier: *O* funds a trust with her transfer tax exemption amount,²⁰³ to pay the income to her daughter, *A*, for life.²⁰⁴ The trust instrument gives *A* the power to appoint the trust corpus outright or in further trust to such of *O*'s descendants, other than herself (to avoid ownership equivalence²⁰⁵), as *A* names by deed or by will. On *A*'s death, the remainder not appointed by *A* is to be held in separate share trusts for each of *A*'s children, subject to the same terms, thus re-starting the cycle.

Although in this example each generation may bring an end to the trust by appointing the trust property to the next generation outright rather than in further trust, the next generation cannot compel the prior generation to do so. Such a power is dynastic, as it limits consumption by the current generation, forcing the property down the line of descent.²⁰⁶ Moreover, this power of appointment is a feature of the trust, as sketched out here, in accordance with standard formbook language.²⁰⁷ Such a power is not required. To the contrary, in a state that has authorized perpetual trusts, *O* could create a trust for lifetime benefit of each successive generation in perpetuity, with no power in anyone to terminate the trust or change the order of succession — an entail.²⁰⁸

Recall Blackstone's description of a perpetuity: "[T]he settlement of an interest, which shall go in the succession prescribed, without any power of alienation."²⁰⁹ Because the perpetual trust statutes enable a donor to create an inalienable string of beneficial life estates "to which the device of common recovery [cannot] be applied,"²¹⁰ they have resurrected the entail in a new guise. The Restatement (Third) of Property explains:

A perpetual or centuries-long trust has a strong similarity to the fee tail estate, and might be called an equitable fee tail. Such trusts typically provide that trust income, after the settlor's death, is to be paid, or in the discretion of the trustee is to be paid, to the set-

²⁰³ The exemption amount can be leveraged with life insurance or other assets likely to appreciate, making it more valuable than its face amount. See Restatement (Third) of Property: Wills and Other Donative Transfers, ch. 27, intro note, p. 561 (2012); Iris J. Goodwin, How the Rich Stay Rich: Using a Family Trust Company to Secure a Family Fortune, 40 Seton Hall L. Rev. 467, 489-97 (2010). Another common strategy is to obtain valuation discounts for lack of marketability and control by way of a family limited partnership or otherwise. See Dukeminier & Sitkoff, *supra* note __, at 950-52.

²⁰⁴ See *supra* Part II.C.3. As indicated there, this example is based on Nenno, *supra* note __, at 333-47.

²⁰⁵ A power to appoint to oneself is an ownership-equivalent power, which would bring the property into *A*'s taxable estate and subject it to claims by *A*'s creditors. See Dukeminier & Sitkoff, *supra* note __, at 800-04.

²⁰⁶ A point recognized by traditional perpetuities law. See *supra* note __.

²⁰⁷ See *supra* note __ and text accompanying.

²⁰⁸ Even those who defend perpetual trusts on the grounds that powers of appointment are "not unusual" concede that under the statutes a perpetual trust can be drafted to "last forever," without such a power in anyone. Crawford, *supra* note __, at 86-87.

²⁰⁹ See *supra* note __ and text accompanying.

²¹⁰ See *supra* note __ and text accompanying.

tlor's issue living from time to time forever or for several hundred years, i.e., the equivalent or substantial equivalent of a continuum of successive life estates in income.²¹¹

Because the perpetual trust statutes run counter to the longstanding common law tradition of opposing "the evolution, under some newer guise, of any form of perpetual unbarrable entail,"²¹² they run counter to the core policy value of the constitutional bans on perpetuities. The constitutional bans were meant to proscribe any form of transfer that amounts to a perpetual entailment of property down the generations.

That a perpetual trust can include a spendthrift provision is an aggravating factor. American trust law recognizes the enforceability of a spendthrift provision, which is a disabling restraint imposed by the settlor that prevents voluntary or involuntary alienation of the beneficial interest.²¹³ Spendthrift provisions are routinely included in professionally drafted trusts, if only by rote inclusion of formbook boilerplate, and a growing number of states make trusts spendthrift by default.²¹⁴ A spendthrift provision in a perpetual trust prevents voluntary or involuntary alienation of the successive beneficial interests, forever.

The historical sources support three overlapping functional rationales for the constitutional bans on perpetuities: (1) ensuring marketable title, (2) protecting against changed circumstances, and (3) avoiding concentrations of wealth and power, with the third being paramount for the framers of the bans.²¹⁵ The framers' worry was the kind of dynastic concentration of wealth and political power that was associated with English aristocracy. Yet both champions and critics of perpetual trusts, which tellingly are marketed as "dynasty trusts," agree that their primary purpose is concentration and protection of family wealth.

Critics of perpetual trusts, such as Professor Ray Madoff, argue that perpetual spendthrift trusts will "creat[e] a new aristocracy made up of individuals who have access to large amounts of untaxed wealth to meet their every need and desire while being immune from the claims of creditors."²¹⁶ Supporters make a similar point, albeit from a different perspective. Proponents of perpetual dynasty trusts in Nevada, for example, claimed that they were creating a "fantasy world" in which assets may be held and pro-

²¹¹ Restatement (Third) of Property: Wills and Other Donative Transfers §24.4 cmt. c (2011); *see also* Jeffrey Evans Stake, *Evolution of Rules in a Common Law System: Differential Litigation of the Fee Tail and Other Perpetuities*, 32 Fla. St. U. L. Rev. 401, 421–23 (2005) (arguing that modern "dynasty trusts" recreate the fee tail).

²¹² *See supra* notes __ and text accompanying.

²¹³ *See* Dukeminier & Sitkoff, *supra* note __, at 694–97.

²¹⁴ *See* Jeffrey A. Schoenblum, *Multistate Guide to Trusts and Trust Administration* tbl. 5, pt. 1 (2012).

²¹⁵ *See supra* Part IV.

²¹⁶ Ray D. Madoff, *Immortality and the Law: The Rising Power of the American Dead* 76 (2010); *see also* Ray D. Madoff, *America Builds an Aristocracy*, N.Y. Times, July 9, 2010 (arguing that perpetual trusts "enable affluent people to provide their heirs with money and property largely free from taxes and immune to the claims of creditors ... for generations in perpetuity – truly creating an American aristocracy").

tected “for your descendants forever!”²¹⁷ Across the country, a “heavily promoted” reason for creating a perpetual dynasty trust is “the ability to protect family wealth from beneficiaries’ bad judgment or misfortune.”²¹⁸

Yet as we have seen, allowing a donor to concentrate wealth within her family down the generations by prescribing a fixed order of succession to a perpetual string of life estates, as permitted by the perpetual trust statutes, is precisely what the framers of the constitutional prohibitions meant to proscribe.²¹⁹ Consider again two pieces of the myriad evidence adduced earlier. First, in implementation of the state constitutional directive to “prevent perpetuities,” in 1784 the North Carolina legislature transformed fee tails into fee simple on the reasoning that entails give particular families “unequal and undue influence in a republic.”²²⁰ The problem with perpetuities, in other words, is that they tend toward unjustified concentration of power inconsistent with a “free state.” Second, when the California ban was first introduced in convention, its sponsor explained: “It is to prevent perpetuity of lands from families to families. It is upon perpetuities that aristocracies are built up. Democracy would soon be overturned if this was allowed.”²²¹

Our analysis finds a supportive analogy in *Succession of Lauga* (1993).²²² At issue in that case, decided by the Louisiana Supreme Court, was a state constitutional provision that “[n]o law shall be passed abolishing forced heirship,”²²³ meaning that state’s mandatory inheritance for descendants. In the teeth of this provision, the legislature passed a statute limiting forced heirship to incompetent descendants and those under the age of twenty-three. Reasoning that the statute “promotes the very evils that the forced heirship guarantee was designed to combat,” including “the concentration of family estates in fewer than all the children” and so “excessive concentrations of wealth,” the court held that the statute was unconstitutional.²²⁴

2. A Contrary Precedent?

²¹⁷ Oshins & Ruud, *supra* note __, at *18.

²¹⁸ Joshua C. Tate, *Perpetual Trusts and the Settlor’s Intent*, 53 U. Kan. L. Rev. 595, 613-15 (2005).

²¹⁹ *See supra* Part IV.

²²⁰ *See supra* notes __-__ and text accompanying.

²²¹ *Debates in the Convention of California on the Formation of the State Constitution* 272 (J. Ross Brown ed., 1850); *see also* Robert H. Gerdes, “Perpetuities” and the California Rule Against Suspension of the Absolute Power of Alienation, 16 Cal. L. Rev. 81, 92-93 (1928) (noting that this “quotation explains the evil that the constitution framers desired to prevent and should be considered by the courts in interpreting the meaning of the constitution”).

²²² 624 So.2d 1156 (La. 1993).

²²³ *Id.* at 1158.

²²⁴ *Id.* The state constitution was subsequently amended to allow for the reform. *See* La. Const. art 12, §5, as amended by 1995 La. Sess. Law Serv. Act 1321 (H.B. 9).

Thus far there is only one reported appellate decision on the constitutionality of a contemporary perpetual trust statute in a state that has a constitutional ban on perpetuities. That case, *Brown Bros. Harriman Trust Co. v. Benson* (2010), decided by an intermediate appellate court in North Carolina, upheld the state's perpetual trust statute against constitutional challenge.²²⁵ Because the holding in *Benson* only pertains to a narrow slice of the broader question, and because its exegesis of the constitutional provision is deeply flawed, it should not be followed by the North Carolina Supreme Court or by courts in other states.²²⁶

The perpetual trust at issue in *Benson* was settled in North Carolina three months after the state repealed its Rule Against Perpetuities. The litigation was initiated by the trustee after some of the beneficiaries questioned the constitutionality of the repeal and so the validity of the trust.²²⁷ As in many of the perpetual trust states,²²⁸ the North Carolina statute allows for a perpetual trust if the trustee has the power to sell the trust property²²⁹ – in the jargon, if the trust does not suspend the trustee's power of alienation.²³⁰ This requirement answers the marketability problem, in that the trust property is not removed from commerce, but it does not address the problem of changes in circumstances in relation to the administrative structure of the trust or its dispositive provisions, nor does it address the concern about concentrations of wealth.²³¹

The beneficiaries took the position that the common law rule was mandated by the state constitution.²³² The court therefore framed the case thus: "The sole issue before the Court in this case is whether the North Carolina Constitution requires application of the common law rule against perpetuities' restriction of the remote vesting of future interests in property. We conclude that it does not."²³³ On this narrow point, the court was surely correct. As we have seen, the relevant text, history, and precedents all suggest that the state constitutional bans on perpetuities may be satisfied otherwise than by the common law Rule, hence modest reform, such as reformation and wait-and-see, is con-

²²⁵ 688 S.E.2d 752 (N.C. App. 2010).

²²⁶ John Orth reminds us that the North Carolina Supreme Court declined twice to review the appellate court's decision. See *Brown Bros. Harriman Trust Co. v. Benson*, 698 S.E.2d 391 (N.C. 2010); *Brown Bros. Harriman Trust Co. v. Benson*, 703 S.E.2d 157 (N.C. 2010).

²²⁷ *Id.* at 753-52.

²²⁸ See *supra* note __.

²²⁹ 688 S.E.2d at 753 n.1, citing N.C. Gen. Stat. §41-23, enacted by Act of Aug. 19, 2007, ch. 41, 2007-391 N.C. Sess. Laws 1148.

²³⁰ See Dukeminier & Sitkoff, *supra* note __, at 912.

²³¹ See Dukeminier & Krier, *supra* note __, at 1321.

²³² 688 S.E.2d at 754.

²³³ *Id.* at 753.

stitutional.²³⁴ The beneficiaries' position would render unconstitutional those reforms, such as under USRAP, which casts doubt on the tenability of their argument.²³⁵

So the court was correct to answer the "sole issue" before it, whether the state constitution "requires application of the common law rule," in the negative. But in further exposition, the court went on to say that the statute at issue satisfies the "constitutional prohibition of perpetuities because it provides a mechanism for preventing unreasonable restraints on alienation."²³⁶ The court continued, "Rather than addressing alienability of property indirectly by regulating the vesting of remote interests, as does the common law rule, [the statute] directly preserves alienability of property by prohibiting suspension of the power of alienation."²³⁷ This further exposition, arguably dicta because it was unnecessary to answer the "sole issue" before the court, is contrary to the constitutional provision's text, history, purpose, and precedents.

Conceding that "the historical definition of the term [perpetuity] is the most relevant," the court concluded without citation to the contextual historical evidence that the constitutional "prohibition prohibits unreasonable restraints on alienation."²³⁸ To be sure, alienability has loomed as a significant consideration in what constitutes a perpetuity. But in the words of the distinguished legal historian Brian Simpson, in context the term perpetuity "meant an unbarrable entail, in whatever guise it appeared."²³⁹ The abundant evidence canvassed earlier, almost none of which was brought to the court's attention by the briefs on appeal, points strongly to the conclusion that the term "perpetuity" as used in the state constitutions means an entail, in function or in form, with reference to alienability of beneficial ownership, not merely alienability of the underlying property. The court failed, in other words, to attend to the bifurcation of legal and equitable or beneficial ownership that is the "hallmark characteristic" of a donative trust.²⁴⁰ What makes a perpetual trust the latest guise of an unbarrable entail is that it can be used to create a perpetual string of inalienable beneficial interests down the generations.

The judges in *Benson*, who appear to have been unfamiliar with the history of perpetuities,²⁴¹ were persuaded by the argument of the trustee that, "[u]nlike entails and fee tails, dynasty trusts do not tie up property in one family for generations so long as

²³⁴ See *supra* notes __-__ and text accompanying.

²³⁵ 688 S.E.2d at 756. The beneficiaries' argument would also invalidate exclusion of nondonative transfers, as under USRAP §4(1), which was implicitly upheld in *Rich, Rich & Nance v. Carolina Const. Corp.*, 558 S.E.2d 77, 79-80 (N.C. 2002).

²³⁶ *Id.* at 757.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ See *supra* note __ and text accompanying.

²⁴⁰ *Dukeminier & Sitkoff*, *supra* note __, at 393.

²⁴¹ For example, the court referred to the period of the rule as "an arbitrary stopping point," 688 S.E.2d at 756, without regard for the deeply principled know-and-see basis for lives in being plus twenty-one years, see *supra* notes __-__ and text accompanying.

the trustee has power to sell the trust property.”²⁴² But this argument does not come to grips with the point that a dynasty trust is an equitable fee tail in which the settlor can mandate the order of succession for a perpetual string of inalienable beneficial interests. The argument confuses the policy of the rule against suspension of the power of alienation with the policy of the Rule Against Perpetuities.²⁴³ This confusion is relevant, because in the court’s words, “[c]onstitutional provisions should be construed in consonance with the objects and purposes in contemplation at the time of their adoption.”²⁴⁴ The court’s focus on alienability of the trust property obscured the other “objects and purposes” of the bans, such as the problem of changed circumstances. In Blackstone’s words, “by perpetuities . . . estates are made incapable of . . . providing for the sudden contingencies of private life,”²⁴⁵ a problem not solved as regards the administrative and dispositive structure of a trust by giving the trustee the power to sell the trust property.²⁴⁶

Still another policy worry underpinning the law of perpetuities, probably dominant in motivating the constitutional bans, was preventing unjustified concentrations of wealth.²⁴⁷ In *Benson*, the court quoted an earlier decision of the state supreme court, *Griffin v. Graham* (1820), for the proposition that a perpetuity is “an estate tail so settled that it cannot be undone or made void.”²⁴⁸ But in a further passage, which was elided by the appellate court in *Benson* with an ellipsis, the supreme court in *Griffin* reviewed historical evidence showing that perpetuities, meaning entails, were banned because they “tended to raise the wealth and importance of particular families, and to give them an undue influence in the republic.”²⁴⁹ Like the concern about changes in circumstances, worry about concentration of wealth pertains to the alienability of the beneficial interest, not the alienability of the underlying property.

The particulars of *Griffin*, unremarked upon by the court in *Benson*, are instructive. The question presented was whether the constitutional ban on perpetuities applied to a charitable gift. The supreme court held in the negative, reasoning that a charitable

²⁴² The trustee argued Plaintiff-Appellee’s Brief, *Brown Brothers Harriman Trust Co., N.A. v. Benson*, Case No. COA-09-474, at 16; *see also id.* at 21 (“So long as a trustee is free to transfer title to the property owned by the trust, there is no constitutionally prohibited restraint on alienation.”).

²⁴³ *See Orth*, *supra* note __, at 403-07; *see also In re Sahlender’s Estate*, 201 P.2d 69, 77-78 (Cal. App. 1949) (distinguishing the Rule Against Perpetuities (i.e., the rule against remote vesting), enshrined by the state constitution, from the rule against suspension of the power of alienation); *see also Gerdes*, *supra* note __ (discussing remoteness of vesting, suspension of the power of alienation, and the state constitutional bans).

²⁴⁴ 688 S.E.2d at 754 (quoting *State v. Webb*, 591 S.E.2d 505, 509 (N.C. 2004)).

²⁴⁵ *See supra* note __ and text accompanying.

²⁴⁶ Commentators have suggested that liberalization of trust modification and termination rules may be required in light of the rise of perpetual trusts. *See, e.g.,* Ronald Chester, *From Here to Eternity? Property and the Dead Hand* 53-58 (2007) (suggesting that “modification and termination will be the key issue for trust law in the 21st century . . . in light of the decline in importance of the Rule Against Perpetuities”).

²⁴⁷ *See supra* Part IV.A.3.

²⁴⁸ *Id.* at 755 (quoting *Griffin v. Graham*, 8 N.C. 96, 130-32 (1820)).

²⁴⁹ *Griffin*, 8 N.C. at 131.

gift does not give rise to the “evil” of concentrating “wealth and importance” in “particular families.”²⁵⁰ The court said that the constitutional ban “did not contemplate the possibility of any evil likely to arise from the establishment of a permanent fund for charitable uses.”²⁵¹ To the contrary, the “probable effect of” the gift “was the reverse of what” the ban was “meant to guard against, as it promised to increase the equality of the republic.”²⁵² The court took notice of the fact that the charitable fiduciaries, “like other trustees, may sell for a valuable consideration,” but it did not resolve the case on the grounds that the gift did not suspend the fiduciary’s power of alienation.²⁵³ Such reasoning, adopted by the court in *Benson*, would have mooted the need to consider whether a charitable gift could give rise to the evil of concentrating wealth.

In sum, the centerpiece of the court’s reasoning in *Benson* was that by insisting that the trustee have the power to sell the trust property, the state perpetual trust statute “provides a mechanism for preventing unreasonable restraints on alienation.”²⁵⁴ But this is a narrow, ahistorical understanding of the “objects and purposes” of the constitutional ban and of the meaning of the term “perpetuity.” A perpetual trust is an equitable fee tail, a perpetual string of inalienable equitable life estates, which is an unbarrable entail in a new guise — precisely what the framers of the bans sought to proscribe.

3. *Plausibility and Tax Policy*

In accordance with the historical sources, we have emphasized the purpose of avoiding dynastic concentrations of wealth and power such as was associated with English aristocracy. It is not obvious, however, that a string of inalienable equitable life estates by way of a perpetual trust will in fact concentrate wealth and power in individual families, or that if so, a rule against remote vesting of interests is the right instrument of policy for dealing with the externalities of such concentrations.

To begin with, as Jonathan Macey has observed, “unless trustees systematically are able to invest trust accumulations so as to outperform all other investments, there is no reason that permitting such accumulations will allow wealth to become more concentrated.”²⁵⁵ And trustees do not have systematically better information than other investors in fiercely competitive capital markets. Moreover, as one of us has argued elsewhere, “even after the recent modernization of trust investment law, as compared to outright ownership the trust form carries with it additional agency costs, an extra layer of fees

²⁵⁰ Griffin, 8 N.C. at 131.

²⁵¹ Id.; see also *State v. McGowen*, 37 N.C. 9, 15-16 (1841) (following *Griffin*); *Franklin v. Armfield*, 34 Tenn. 305, 353-58 (1854) (same).

²⁵² 8 N.C. at 131.

²⁵³ Id.

²⁵⁴ 688 S.E.2d at 757.

²⁵⁵ Jonathan R. Macey, *Private Trusts for the Provision of Private Goods*, 37 Emory L.J. 295, 311 (1988).

and commissions, and higher rates of federal income taxation. Each of these factors imposes drag on trust fund performance.”²⁵⁶

A further dissipating factor will be the proliferation of beneficiaries down the generations. In only 150 years, not so much longer than a trust could endure under traditional law, “a perpetual trust could have about 450 living beneficiaries; after 250 years, more than 7,000 living beneficiaries.”²⁵⁷ We are doubtful that “any investment program could produce a matching geometric growth in trust corpus, especially if the current beneficiaries make demands on the trust income.”²⁵⁸

To make administration feasible, a perpetual trust with proliferating beneficiaries likely will require periodic division into multiple separate trusts.²⁵⁹ After enough divisions, the trusts likely will be small enough to warrant termination on grounds of inefficiency.²⁶⁰ Moreover, after a few generations, and so a few divisions of the trust, it is likely to be incoherent to speak of all the disparate beneficiaries of the original trust as belonging to the same family. If one goes back far enough, one can find a common ancestor for President Barack Obama and President George W. Bush.²⁶¹ But it would be peculiar to speak of them as belonging to the same family.

Even if these suppositions are wrong, and perpetual dynasty trusts do wind up concentrating wealth and power in particular families, progressive income and transfer taxation is a more apt policy instrument for dealing with the resulting externalities than the Rule Against Perpetuities.²⁶² Here we are making two claims, one of tightness of fit and the other of political reality. Income and transfer taxes are more direct, allow for finer calibration, and are of broader application than the Rule. The richest Americans today

²⁵⁶ Robert H. Sitkoff, *The Lurking Rule Against Accumulations of Income*, 100 Nw. U. L. Rev. 501, 514 (2006); *see also* Lawrence M. Friedman, *Dead Hands: A Social History of Wills, Trusts, and Inheritance Law* 136-39 (2009).

²⁵⁷ Lawrence W. Waggoner, *From Here to Eternity: The Follow of Perpetual Trusts*, Univ. of Mich. Law Sch. Pub. Law & Legal Theory Research Paper No. 259 (2014) [ED: It is on SSRN. -AU].

²⁵⁸ Dukeminier & Sitkoff, *supra* note __, at 903. For analysis, *see* Lucy A. Marsh, *The Demise of Dynasty Trusts: Returning the Wealth to the Family*, 5 Est. Plan. & Community Prop. L.J. 23 (2012); William J. Turnier & Jeffrey L. Harrison, *A Malthusian Analysis of the So-Called Dynasty Trust*, 28 Va. Tax Rev. 779 (2009). No matter how broad a trustee’s discretion in distributions, the trustee’s exercise (or nonexercise) of that discretion is always subject to review by a court. *See* Dukeminier & Sitkoff, *supra* note __, at 610-11.

²⁵⁹ The power to divide a trust is familiar boilerplate, as in *Nenno*, *supra* note __, at 339; is provided by Uniform Trust Code §417 (2000); and is recognized as a matter of common law by Restatement (Third) of Trusts §68 (2003).

²⁶⁰ *See* Uniform Trust Code §414 (2000); Restatement (Third) of Trusts §66 cmt. d (2007).

²⁶¹ Waggoner, *supra* note __, at 7 [Folly]; *see also* Lawrence W. Waggoner, *US Perpetual Trusts*, Law. Q. Rev. 423, 426-27 (2011)..

²⁶² *See* Wojciech Kopczuk, *Economics of Estate Taxation: Review of Theory and Evidence*, 63 Tax L. Rev. 139, 151-53 (2009) (“This brings me to what I think is the strongest argument for considering estate taxation: the possibility of externalities from wealth concentration.”); *see also* Leach, *supra* note __, at 727 (“Graduated estate and income taxes have largely eliminated any threat to the public welfare from family dynasties built either on great landed estates or on great capital wealth.”).

increasingly trace their wealth not to inheritance but to the application of their human capital in scalable industries such as technology and finance.²⁶³ Moreover, if set at the federal level, income and transfer taxes won't unravel, as did the Rule, in a jurisdictional competition among the states.²⁶⁴ The political reality is that "Congress has come to be in charge of trust duration."²⁶⁵ Or as one of us put the point elsewhere, "debate over the principle of freedom of disposition, and its role in perpetuating inequalities of wealth, has become a question of federal tax policy."²⁶⁶

To be clear, our questioning of whether perpetual trusts will in fact concentrate wealth and, if so, whether a rule against remote vesting is the right policy instrument to address the matter, does not undermine our principal conclusion that the statutes authorizing perpetual trusts are unconstitutional in the states with a constitutional ban on perpetuities. Those provisions give constitutional status to the longstanding common law policy against entails, whether in form or in function. The modern perpetual trust is an equitable fee tail, allowing for a perpetual string of inalienable life estates, hence it is the latest guise in which the unbarrable entail has appeared.

C. Perpetual Trusts Settled in Another State

The jurisdictional competition for perpetual trust funds depends on a particular backdrop choice-of-law rule. The assumption is that for a trust funded with liquid financial assets, naming a trustee located in another state and giving that trustee custody of the trust fund is enough to ensure that courts will enforce a provision in the trust specifying that the law of that state is to govern the validity and administration of the trust.²⁶⁷ Some perpetual trust states provide for this outcome expressly by statute, as does the Uniform Trust Code.²⁶⁸ The common law is in accord, as the presence of the trustee and the trust funds in the chosen state provides a "substantial relation" between the trust and the state.²⁶⁹

²⁶³ See Steven N. Kaplan & Joshua Rauh, *It's the Market: The Broad-Based Rise in the Return to Top Talent*, 27 *J. Econ. Persp.* 35, 36 (2013); see also Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 *U. Chi. L. Rev.* 417 (1952).

²⁶⁴ Federal wealth transfer taxation is, however, subject to its own political pathologies. See, e.g., Michael J. Graetz & Ian Shapiro, *Death by a Thousand Cuts: The Fight over Taxing Inherited Wealth* (2006).

²⁶⁵ Dukeminier & Krier, *supra* note __, at 1343; see also Lawrence W. Waggoner, *Congress Promotes Perpetual Trusts: Why?*, available at <http://ssrn.com/abstract=2326524>. The Treasury Department has proposed levying a periodic tax on perpetual trusts. See U.S. Dep't of the Treasury, *General Explanations of the Administration's Fiscal Year 2015 Revenue Proposals 164-65* (2014); compare Lawrence W. Waggoner, *Effectively Curbing the GST Exemption for Perpetual Trusts*, 135 *Tax Notes* 1267 (2012), with Dennis I. Belcher et al., *Federal Tax Rules Should Not Be Used to Limit Trust Duration*, 136 *Tax Notes* 832 (2012).

²⁶⁶ Dukeminier & Sitkoff, *supra* note __, at 920.

²⁶⁷ See *supra* note __ and text accompanying.

²⁶⁸ See *supra* notes __-__ and text accompanying.

²⁶⁹ Restatement (Second) Conflict of Laws § 270(a) (1971).

But the constitutional perpetuities bans introduce a complicating wrinkle. Prevailing conflict-of-laws doctrine allows a court to refuse to apply foreign law that violates a “strong public policy of the forum” state.²⁷⁰ “Invoking the concept of ‘public policy,’ a court can refuse to enforce, as contrary to its own notions of justice and fairness, a rule found in the state designated by the forum’s choice-of-law rule.”²⁷¹ This public policy backstop applies to trusts and estates matters, including a settlor’s choice of law to govern the validity of a trust.²⁷²

Accordingly, if a dispute relating to an out-of-state perpetual trust were to be litigated in a state with a constitutional ban on perpetuities, the courts of the forum state would be confronted with the question of whether the forum state’s constitutional ban reflects the kind of strong public policy warranting a refusal to apply the other state’s law authorizing perpetual trusts.²⁷³ The possibility of such a case is not fanciful. For example, the courts of the state where a person is domiciled or resides might be asked to pass on the validity of an out-of-state trust in computing a surviving spouse’s forced share or in a divorce proceeding (albeit with a personal jurisdiction limit²⁷⁴). In such a case, the question would be whether, in the words of Justice Cardozo, the constitutional bans state a strong public policy such that enforcing the perpetual trust statute of another

²⁷⁰ Id. §90; *see also* Andrew Koppelman, Same-Sex Marriage, Choice of Law, and Public Policy, 76 Tex. L. Rev. 921, 934-44 (1998) (surveying the public policy exception in conflict of laws).

²⁷¹ Russell J. Weintraub, Commentary on the Conflict of Laws § 1.1, at 81 (3d ed. 1986).

²⁷² *See* Restatement (Second) Conflict of Laws § 270(a) (1971) (“An inter vivos trust of interests in movables is valid if valid ... under the local law of the state designated by the settlor to govern the validity of the trust, provided that this state has a substantial relation to the trust *and that the application of its law does not violate a strong public policy of the state* with which, as to the matter at issue, the trust has its most significant relationship”) (emphasis added). The principal has been codified by UTC §107(1) (2000) (“The meaning and effect of the terms of a trust are determined by[] ... the law of the jurisdiction designated in the terms of the trust unless the designation of that jurisdiction’s law is contrary to a strong public policy of the jurisdiction have the most significant relationship to the matter at issue.”).

²⁷³ *See* Jonathan D. Blattmachr et al., Avoiding the Adverse Effects of *Huber*, Tr. & Est., July 2013, at 20, 22 (raising the possibility “that a Texan ... couldn’t create a perpetual trust in another state,” because “the policy in Texas against perpetual trusts is contained in its state constitution”).

²⁷⁴ A court can issue a binding order on a trustee only if it has personal jurisdiction over the trustee, which might not be the case for an out-of-state trust. *See, e.g.,* Sterk, *supra* note __, at 1089 (noting that a litigant challenging the validity of an out-of-state trust “must still obtain a forum state judgment that will be effective against either the trustee or the trust property”); Jeffrey A. Schoenblum, Reaching for the Sky – Or Pie in the Sky: Is U.S. Onshore Trust Reform an Illusion?, in *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* 291, 300 (David Hayton ed., 2002) (“[T]he ultimate question is whether the local court will be able to exercise jurisdiction over the out-of-state trust or the foreign trustee.”); *cf. Hanson v. Denckla*, 357 U.S. 235 (1958) (holding that Florida court that probated decedent’s will lacked jurisdiction over the trustee of a Delaware inter vivos trust). But even if a court lacks personal jurisdiction over a foreign trustee, it may consider the fact of the trust assets in reckoning the value of a marital estate in a divorce proceeding or of a decedent’s estate in computing a surviving spouse’s elective share, and it may issue an order for subsequent enforcement in a court that does have personal jurisdiction over the trustee. *See, e.g., Riechers v. Riechers*, 178 Misc.2d 170 (N.Y. Sup. Ct. 1998) (“While the ultimate determination of the entitlement to the corpus of the trust remains with the high court of Cook Islands, this court awards to the plaintiff one half of the value of the marital assets placed in the Cook Islands trust” (emphasis omitted)), *aff’d*, 267 A.D.2d 445 (2d Dep’t 1999).

er state “would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”²⁷⁵

Although the issue has yet to be litigated, other conflict-of-laws cases involving trusts and estates suggest that “there is a real possibility that” a forum state with a constitutional ban will refuse to enforce an out-of state perpetual trust.²⁷⁶ One analogy is to the spousal forced share.²⁷⁷ Some courts have refused to enforce a choice-of-law provision in a decedent’s will that would defeat the forced share of the decedent’s domicile at death.²⁷⁸ Another analogy is to self-settled asset protection trusts.²⁷⁹ A small but growing case law has refused enforcement of such a trust settled in another state on public policy grounds.²⁸⁰

In harmony with our conclusion that reformation and wait-and-see do not violate the state constitutional bans on perpetuities, courts have upheld trusts under out-of-state perpetuities law that is more forgiving than the forum state’s law.²⁸¹ The Restatement (Second) of Conflict of Laws deduces from these cases the principle that differences in perpetuities law do not fall within the public policy exception.²⁸² As Judge Posner has observed, “obviously the mere fact that foreign and domestic law differ on some point is not enough to invoke the exception. Otherwise in every case of an actual conflict

²⁷⁵ *Loucks v. Standard Oil Co. of New York*, 120 N.E. 198, 202 (N.Y. 1918).

²⁷⁶ Schoenblum, *supra* note __, at 299.

²⁷⁷ *See* Dukeminier & Sitkoff, *supra* note __, at 512-36.

²⁷⁸ *Compare* *In re Estate of Clark*, 236 N.E.2d 152, 158 (N.Y. 1968) (“Virginia’s overwhelming interest in the protection of surviving spouses domiciled there demands that we apply its law to give the widow in this case the right of election provided for her under that law”), *with* *Nat’l Shawmut Bank of Boston v. Cumming*, 91 N.E.2d 337 (Mass. 1950) (honoring choice of Massachusetts law for Vermont domiciliary, notwithstanding that doing so defeated widow’s elective share under Vermont law); *see also* Uniform Prob. Code §2-602 (“The meaning and legal effect of a disposition in a will shall be determined by the local law of a particular state selected by the testator in his instrument unless the application of that law is contrary to the provisions relating to the elective share described in Part 2 of this Article, the provisions relating to exempt property and allowances described in Part 4 of this Article, or any other public policy of this State otherwise applicable to the disposition.”); Christopher P. Cline, Jeffrey N. Pennell & Terry L. Turnipseed, *Spouse’s Elective Share A-31* (BNA T.M.P. No. 841, 2012).

²⁷⁹ *See* Dukeminier & Sitkoff, *supra* note __, at 703-14.

²⁸⁰ *See* *In re Huber*, 493 B.R. 798, 809 (Bankr. W.D. Wash. 2013) (reasoning that, because “Washington has a policy that a debtor should not be able to escape the claims of his creditors by utilizing a spendthrift trust,” the court would “disregard the settlor’s choice of Alaska law, which is obviously more favorable to him, and will apply Washington law in determining the Trustee’s claim regarding validity of the Trust”); *see also* *Marine Midland Bank v. Portnoy* (*In re Portnoy*), 201 B.R. 685, 701 (Bankr. S.D.N.Y.1996) (“Portnoy may not unilaterally remove the characterization of property as his simply by incorporating a favorable choice of law provision into a self-settled trust of which he is the primary beneficiary.”); *In re Brooks*, 217 B.R. 98, 101-02 (Bankr. D. Conn. 1998) (refusing to apply foreign law authorizing spendthrift trust in part “on the basis of public policy considerations”); Ronald Mann, [Ed: paper in this symposium. -AU].

²⁸¹ *See* *Cross v. United States Trust Co. of New York*, 30 N.E. 125 (N.Y. 1892) (perpetuities); *see also* *Whitney v. Dodge*, 38 P. 636 (Cal. 1894); *Shannon v. Irving Trust Co.*, 9 N.E.2d 792 (N.Y. 1937) (accumulations).

²⁸² *See* Restatement (Second) of Conflict of Laws §269 cmt. g; §270 cmt. d (1971).

the court of the forum state would choose its own law; there would be no law of conflict of laws.”²⁸³

But the question of whether a constitutional ban on perpetuities reflects the kind of strong public policy that would warrant refusal to apply another state’s law authorizing perpetual trusts is meaningfully different in two respects. First, giving effect to another state’s perpetuities reform, such as wait-and-see, that has not been adopted in the forum state is only to respect another state’s subtly different implementation of the same basic public policy. To give effect to another state’s repeal of the rule, by contrast, is to deny the forum state’s contrary public policy as enshrined in the state constitution.

Second, that the forum state’s policy is mandated by the state constitution, in this case a proscription of something that some of the provisions characterize as “contrary to the genius of a free state,”²⁸⁴ implies that the public policy at stake is strong indeed. In other contexts, courts have invoked the public policy exception based on conflict with the forum state’s constitution. *Kilberg v. Northeast Airlines, Inc.* (1961), a decision of the New York Court of Appeals, is illustrative.²⁸⁵ In that case the court refused to apply a Massachusetts statute that capped damages for wrongful death. The court reasoned that the cap conflicted with New York public policy as established by a provision in the New York state constitution, dating back to 1894, which provided that damages in an action “for injuries resulting in death ... shall not be subject to any statutory limitation.”²⁸⁶

The court in *Kilberg* emphasized that the constitutional policy at issue was “strong, clear, and old.”²⁸⁷ The same has been said by other courts of the constitutional perpetuities bans. The Texas Supreme Court, for example, has said that “[t]his constitutional provision expresses one of the cardinal and basic principles of our system of government.”²⁸⁸ It would be a rather modest step, therefore, for a court to connect these two strands of precedent and hold that the constitutional perpetuities bans represent a strong public policy that warrants a refusal to apply another state’s perpetual trust statute. Accordingly, settling a perpetual trust in a state without a constitutional ban, such as in Delaware or South Dakota, provides no guarantee that the trust will be recognized as valid in the courts of the nine states with such a ban.

VI. Conclusion

²⁸³ *Spinozzi v. ITT Sheraton Corp.*, 174 F. 3d 842, 847 (7th Cir. 1999).

²⁸⁴ *See supra* Figure __.

²⁸⁵ 172 N.E.526 (N.Y. 1961); *see also* *Meyer v. Hawkinson*, 626 N.W.2d 262, 266-67 (N.D. 2001) (invoking state constitutional ban on gambling in refusal to enforce a contract to split Canadian lottery winnings).

²⁸⁶ *Id.*, at 528.

²⁸⁷ *Id.*

²⁸⁸ *Brooker v. Brooker*, 106 S.W.2d 247, 254 (Tex. 1937); *see also* *Mattern v. Herzog*, 367 S.W.2d 312, 314 (Tex. 1963) (“high public policy”); *Franklin v. Armfield*, 34 Tenn. 305, 353 (1854) (“This, of course, is the paramount law of the land.”).

Perpetual trusts, an established feature of today's estate planning firmament, are a multibillion dollar business. Yet little-noticed provisions in the constitutions of nine states, including five that purport to allow perpetual (or effectively perpetual) trusts, proscribe "perpetuities." The potential for these constitutional provisions to disrupt perpetual trust practice is of significant import.

The various state constitutional bans on perpetuities, which are closely linked as a matter of historical development, can be traced back to the North Carolina constitution, which provides: "Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."²⁸⁹ There is abundant evidence that, as used in these provisions, the term "perpetuity" was meant to reference an unbarrable entail, meaning a perpetual string of inalienable life estates, "in whatever guise it appeared."²⁹⁰ But under the perpetual trust statutes, including in five states in the teeth of these constitutional bans, a donor can create a trust for the lifetime benefit of each successive generation in perpetuity, with no power in anyone to terminate the trust or change the order of succession.

The historical sources support three overlapping functional rationales for the constitutional bans: (1) ensuring marketable title, (2) protecting against changed circumstances, and (3) avoiding concentrations of wealth and power, with the third being paramount for the framers of the bans. The framers' worry was the kind of dynastic concentration of wealth and political power that was associated with English aristocracy. Yet both champions and critics of perpetual trusts, which tellingly are marketed as "dynasty trusts," agree that their primary purpose is concentration and protection of family wealth.

Because text, purpose, and history all suggest that the constitutional proscriptions of perpetuities were meant to proscribe entails, whether in form or in function, and because a perpetual trust is in purpose and in function an equitable fee tail, we conclude that recognition of perpetual trusts is prohibited in states with a constitutional prohibition of perpetuities, but more modest reforms such as reformation and wait-and-see are permissible. We also suggest that the constitutional prohibitions might reflect the kind of strong public policy that would authorize a court in a state with such a provision to refuse to apply another state's law authorizing perpetual trusts.

²⁸⁹ N.C. Const. art. I, § 34. This text varies slightly from the version enacted in 1776. *See* N.C. Const. of 1776, Decl. of Rights § 23 ("That perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed.").

²⁹⁰ *See supra* note __ and text accompanying.