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### Congress Promotes Perpetual Trusts: Why?

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## Congress Promotes Perpetual Trusts: Why?

Lawrence W. Waggoner\*

*By unwittingly granting a tax exemption for perpetual trusts, Congress undermined state perpetuity law and promoted private trusts that can last and remain tax exempt for many centuries and maybe forever. As a direct result of Congress's action, and then of lobbying by financial institutions and other interest groups to convince state legislatures to remove the obstacle of perpetuity law, the very wealthy can now create tax-exempt private trusts for generations upon generations of their descendants. And they are massively taking advantage of the opportunity.*

*Congress as an institution has known of its blunder for years, but has failed to remedy its mistake. On February 26, 2014, the House Ways and Means Committee unveiled its long-awaited proposal for comprehensive tax reform, but the proposal does not address the tax exemption for perpetual trusts. The prospect for enactment of comprehensive tax reform in this Congress—the 113th—appears bleak in any event.*

*The author asks why Congress has not acted to correct its mistake and why it seems so uninterested in doing so. There is no federal interest in promoting perpetually tax-exempt trusts and, in fact, the federal interest cuts the other way. Tax revenues are lost by Congress's action and subsequent inaction. A plausible explanation for Congress's persistent indifference to the problem is that the revenue gain by correcting the oversight would be a long way off. Congress is not known for giving a high priority to problems of that sort. The longer Congress procrastinates, however, the amount of wealth that is safely sheltered in perpetually tax-exempt trusts—already estimated to be in the billions of dollars—continues to grow.*

*The Treasury Department has a proposal before Congress for remedying the situation, but the Treasury's proposal, reiterated in the president's proposed budget for 2015 issued on March 4, 2014, but ignored by the Ways and Means Committee's comprehensive tax-reform proposal, is not nearly as effective as it could and should be. The author proposes a remedy that would be entirely effective and would be consistent with the original purpose of the tax law.*

*Regrettably, the prospect that Congress will ever address the problem, much less address it effectively, grows dimmer with each passing year.*

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\* Lewis M. Simes Professor Emeritus of Law, University of Michigan. The author is the Reporter for the recently completed Restatement (Third) of Property: Wills and Other Donative Transfers (vol. 1, 1999; vol. 2, 2003; vol. 3, 2011). Although parts of this article draw on the *Restatement*, the views expressed are my own and not made on behalf of the American Law Institute. For commenting on earlier drafts, I thank Gregory Alexander, Thomas Gallanis, John Langbein, and Raymond Young.

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INTRODUCTION

Years ago, in 1986 to be exact, Congress unwittingly granted a tax exemption for perpetual trusts.<sup>1</sup> In so doing, Congress undermined state perpetuity law and promoted private trusts that can last and remain tax exempt for many centuries and maybe forever.<sup>2</sup> Although Congress as an institution has known of its blunder for years, it has had several opportunities to remedy its mistake but has not done so.<sup>3</sup>

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<sup>1</sup> See *infra* Part III.

<sup>2</sup> See *id.*

<sup>3</sup> It appears that the congressional tax-writing authorities were first officially notified of the problem in a 2005 report of the staff of the Joint Committee on Taxation. See STAFF

Why? Not only is there is no federal interest in promoting perpetually tax-exempt trusts, the federal interest cuts the other way. Tax revenues will be lost by Congress's action and subsequent inaction. A plausible explanation for Congress's persistent indifference to the problem is that no tax revenues are lost *now*.<sup>4</sup> The loss will occur when these trusts cross the boundary previously set by state perpetuity law. Unfortunately, Congress seldom gives a high priority to remedying far-distant problems. Although the congressional tax-writing committees are currently working on comprehensive tax reform, the committees have shown no interest in remedying the problem at hand.<sup>5</sup> The longer Congress procrastinates, however, it is the case that it is permitting an ever-growing accumulation of wealth—already estimated to be in the billions of dollars<sup>6</sup>—to be safely sheltered in perpetually tax-exempt trusts.

I. THE TRADITIONAL STATE-LAW MEANS OF CURTAILING  
EXCESSIVE DEAD-HAND CONTROL—THE COMMON-LAW RULE  
AGAINST PERPETUITIES—WAS DEEPLY FLAWED AND IN NEED OF  
REFORM

By almost any measure, perpetual trusts (often called “dynasty trusts” by those promoting them<sup>7</sup>) constitute excessive dead-hand control.<sup>8</sup> For centuries, Anglo-American law curtailed excessive

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REPORT, JOINT COMMITTEE ON TAXATION, OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES 393 (JCS-02-05, Jan. 27, 2005). For details, *see infra* note 99. *See also* William J. Turnier & Jeffrey L. Harrison, *A Malthusian Analysis of the So-Called Dynasty Trust*, 28 VA. TAX REV. 779, 784 n.10 (2009).

After the JCT staff issued its 2005 report, Congress passed the following acts that amended the Internal Revenue Code without remedying its mistake regarding perpetually tax-exempt trusts: American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013); Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296 (2010); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009); Economic Stimulus Act of 2008, Pub. L. No. 110-185, 122 Stat. 613 (2008); Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, 120 Stat. 292 (2006); Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. No. 109-222, 120 Stat. 345 (2005).

<sup>4</sup> For a more cynical yet plausible explanation, *see infra* note 114.

<sup>5</sup> *See infra* Part VI.B.

<sup>6</sup> *See infra* notes 29, 39-40.

<sup>7</sup> *See* Turnier & Harrison, *supra* note 3, at 811 (“The name chosen to promote such trusts [referring to the term “dynasty trusts”] is primarily the product of a clever marketing campaign and not descriptive of the results that such trusts are likely to produce in the ordinary course of events.”)

<sup>8</sup> *See infra* Part IV.

dead-hand control through the common-law Rule Against Perpetuities (the common-law Rule). Judicial concern about excessive dead-hand control appeared as early as the seventeenth century when Lord Nottingham, in the *Duke of Norfolk's Case*,<sup>9</sup> upheld the trust at issue but suggested that there was a limit “when any inconvenience appears . . . .”<sup>10</sup> The courts thereafter developed the common-law Rule case by case over a long period of time. As developed by the courts, and as crystallized in the late nineteenth century by Harvard Law School Professor John Chipman Gray, the common-law Rule came to be stated as follows: “No [contingent future] interest [in real or personal property] 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.”<sup>11</sup>

As a mechanism for curtailing excessive dead-hand control, the common-law Rule was poorly designed. It suffered from many flaws. First, it invalidated a contingent future interest on the basis of what *might* happen in the future, not on the basis of what actually happened in the future. If, when created, a contingent future interest might not vest or fail to vest within the allowable perpetuity period, the future interest was invalid *ab initio*. Second, the allowable common-law Rule perpetuity period was measured by lives *in being at the creation of the interest* plus twenty-one years (plus, if necessary, a period of gestation). Requiring the measuring lives to be in being at the creation of the interest often divided members of the same generation into measuring and non-measuring lives. Third, the common-law Rule focused only on the validity of a *contingent future interest*, not on the time when a trust or other donative disposition of property terminated.

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<sup>9</sup> 3 Ch. Cas. 1, 22 Eng. Rep. 931 (Ch. 1682).

<sup>10</sup> The background, details, and historical significance of the case are discussed in D.E.C. YALE, INTRODUCTION, 1 LORD NOTTINGHAM'S CHANCERY CASES, at lxxiii–xc1 (1957) (Selden Soc. Vol. 73). Other historical literature includes A.W.B. SIMPSON, LEADING CASES IN THE COMMON LAW 76-79 (1995); A.W.B. SIMPSON, LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW 143-162 (1987) [hereinafter SIMPSON, LEGAL THEORY]; J.H. BAKER & S.F.C. MILSON, SOURCES OF ENGLISH LEGAL HISTORY: PRIVATE LAW TO 1750, at 189-94 (J. Baker ed., 2d ed. 2010); George L. Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19 (1977).

<sup>11</sup> JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201 (2d ed. 1906). A similar formulation was set forth in the first edition of the book published in 1886: “No interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest.” JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201 (1886).

In the middle of the twentieth century, Harvard Law School Professor W. Barton Leach spotted and attempted to fix the first flaw. He assailed the what-might-happen approach for setting what he called “traps for the unwary.”<sup>12</sup> Leach focused on three cases, which he dubbed the “fertile octogenarian,” the “unborn widow,” and the “administrative contingency.” The common thread in these cases was that the Rule invalidated future interests on the basis of exceedingly remote possibilities—the possibility that an elderly man or woman would have a child, the possibility that a man would marry a woman who was not born when the trust was created, and the possibility that a decedent’s estate would not be settled within twenty-one years. Leach’s proposed solution was to replace the what-might-happen approach with a what-does-happen approach. Under the what-does-happen approach, which came to be called wait-and-see, a future interest would only be invalidated if it did not vest, if at all, not later than twenty-one years after some life in being at the creation of the interest. Under the what-does-happen approach, the affected future interests in these three cases would almost certainly turn out to be valid.

Leach had little success in reforming perpetuity law. One of the obstacles was the lack of a consensus about whom to use as measuring lives.<sup>13</sup> The common-law Rule did not provide measuring lives for wait-and-see. Under the common-law Rule, a future interest was either valid or invalid. Validity depended on identifying a measuring life that made the interest valid. Hence, the measuring life was actually a *validating* life, because invalidity arose when no validating life could be identified. Since the purpose of wait-and-see was to save interests that would have been invalid, the common law provided no measuring lives for wait-and-see.

But wait-and-see perpetuity reform did come. In 1978, A. James Casner, Leach’s colleague at Harvard and the reporter for the Second Restatement of Property,<sup>14</sup> brought a wait-and-see proposal before the floor of the American Law Institute. Following a momentous debate involving spirited exchanges between Professor Casner and Professor

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<sup>12</sup> 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 LAW Q. REV. 35 (1952).

<sup>13</sup> See Lewis M. Simes, *Is the Rule Against Perpetuities Doomed? The “Wait and See” Doctrine*, 52 MICH. L. REV. 179 (1953).

<sup>14</sup> Officially, RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS (1983).

Richard R. Powell, who was the reporter for the First Restatement of Property, the Institute in 1979 adopted wait-and-see. The Second Restatement took the form of a two-tier Rule: It provided that a contingent future interest that would be valid under the common-law Rule remains valid at its outset, but a contingent future interest that would be invalid under the common-law Rule is only invalid if it does not actually vest or fail to vest within twenty-one years after the death of the last living measuring life.<sup>15</sup> The Restatement Second provided a specific list of measuring lives to be used for measuring the allowable period. The list included the transferor and the beneficiaries of the disposition who were alive at the creation of the contingent future interest. The Restatement Second's list was controversial<sup>16</sup> and never adopted judicially or legislatively.<sup>17</sup>

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<sup>15</sup> See *id.* §§ 1.1 to 1.6. For a transcript of the Casner-Powell debate, see 56 ALI PROC. 453-66 (1979).

<sup>16</sup> See Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648 (1985). Professor Dukeminier's "causal-relationship" proposal for identifying wait-and-see measuring lives was also controversial. See Lawrence W. Waggoner, *Perpetuities: A Perspective on Wait-and-See*, 85 COLUM. L. REV. 1714 (1985). "Causal relationship" wait-and-see statutes were enacted in only a few states (*e.g.*, KY. REV. STAT. § 381.216 (1979)), and all of them have been repealed (*e.g.*, 2010 Ky. Acts ch. 21, § 14, codified at KY. REV. STAT. § 381.216 (2010)).

<sup>17</sup> The closest legislative enactment occurred in Iowa. See IOWA CODE § 558.68, which uses the following list of measuring lives for wait-and-see:

- (1) The creator of the nonvested interest, if the period of the rule begins to run in the creator's lifetime.
- (2) Those persons alive when the period begins to run, if reasonable in number, who have been selected by the creator of the interest to measure the validity of the nonvested interest or, if none, those persons, if reasonable in number, who have a beneficial interest whether vested or nonvested in the property in which the nonvested interest exists, the grandparents of all such beneficiaries and the issue of such grandparents alive when the period of the rule begins to run, and those persons who are the potential appointees of a special power of appointment exercisable over the property in which the nonvested interests exist who are the grandparents or issue of the grandparents of the donee of the power and alive when the period of the rule begins to run.
- (3) Those other persons alive when the period of the rule begins to run, if reasonable in number, who are specifically mentioned in describing the beneficiaries of the property in which the nonvested interest exists.
- (4) The donee of a general or special power of appointment if the donee is alive when the period of the rule begins to run and if the exercise of that power could affect the nonvested interest.

## II. THE WAIT-AND-SEE REFORM GAINS TRACTION VIA THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES (USRAP)

Although the Restatement Second was not successful in the courts or state legislatures, it did influence perpetuity law. As a direct result of the adoption of wait-and-see by the American Law Institute, the Uniform Law Commission appointed a committee to draft a uniform law on perpetuities. The result was the promulgation of the Uniform Statutory Rule Against Perpetuities (USRAP) in 1986.<sup>18</sup> USRAP continued the two-tier approach, by providing that a contingent future interest that would be valid under the common-law Rule remains valid at the outset, but a contingent future interest that would be invalid under the common-law Rule is only invalid if it does not actually vest or fail to vest within the permissible vesting period.<sup>19</sup> In order to avoid disagreements about whom to use as wait-and-see measuring lives, USRAP abandoned the use of actual measuring lives as a measure of the permissible vesting period and instead adopted ninety years as a conservative approximation of the life-in-being-plus-twenty-one-years period.<sup>20</sup> USRAP made wait-and-see perpetuity reform achievable.

USRAP was incorporated into the Uniform Probate Code<sup>21</sup> and came to be enacted in over half of the states.<sup>22</sup> It was on its way to even wider enactment when Congress intervened, with the effect of stalling and then reversing its progress.

A very important point is that throughout the perpetuity-reform

<sup>18</sup> The author is the reporter for the Uniform Statutory Rule Against Perpetuities.

<sup>19</sup> See UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(a) (1986).

<sup>20</sup> See Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 CORNELL L. REV. 157 (1988). Increased longevity occurring since 1986 has made the 90-years period even more conservative. In 2009, the United Kingdom adopted a 125-year period. See U.K. Perpetuities and Accumulations Act 2009 § 5. The U.K. Act, which applies to England and Wales, can be found at [http://www.opsi.gov.uk/acts/acts2009/pdf/ukpga\\_20090018\\_en.pdf](http://www.opsi.gov.uk/acts/acts2009/pdf/ukpga_20090018_en.pdf).

<sup>21</sup> See UNIF. PROBATE CODE §§ 2-901 to -906.

<sup>22</sup> ARK. CODE ANN. §§ 18-3-101 to -109; CAL. PROB. CODE §§ 21200 to 21225; GA. CODE ANN. §§ 44-6-200 to -206; IND. CODE §§ 32-17-8-1 to -2; KAN. STAT. ANN. §§ 59-3401 to -3408; MASS. GEN. LAWS ch. 184A §§ 1 to 11; MINN. STAT. ANN. §§ 501A.01 to .07; MONT. CODE ANN. §§ 72-2-1002 to -1007; N.J. STAT. ANN. §§ 46:2F-9 to -11; N.M. STAT. ANN. §§ 45-2-901 to -906; N.C. GEN. STAT. §§ 41-15 to -22 (non-trusts); N.D. CENT. CODE §§ 47-02-27.1 to -27.5; OR. REV. STAT. §§ 105.950 to .975; S.C. CODE ANN. §§ 27-6-10 to -80; TENN. CODE ANN. §§ 66-1-201 to -208; W. VA. CODE ANN. §§ 36-1A-1 to -8. No state today follows the common-law Rule in its pure form. Mississippi has not modified the common-law Rule by statute, but appears to have adopted wait-and-see judicially. See *Estate of Anderson v. Deposit Guaranty Nat'l Bank*, 541 So.2d 423 (Miss. 1989).

debates, the central purpose of the Rule as a rule of public policy whose purpose is to prohibit a trust settlor from transferring private wealth in perpetuity was never questioned. The perpetuity-reform movement was about making the Rule easier to understand and more suited to its central purpose.

### III. CONGRESS UNWITTINGLY PROMOTES PERPETUAL TRUSTS

State-law perpetuity reform, including USRAP, was designed to remedy the what-might-happen defect in the common-law Rule, not to extend the permissible length of trusts or to remove any limit on their length. And, before 1986, the wealthy had little incentive and probably little desire to establish perpetual trusts, even though the law of three states—Wisconsin, South Dakota, and Idaho—permitted such trusts.<sup>23</sup> Then, in 1986, Congress enacted the current incarnation of the federal generation-skipping transfer tax (GST tax).<sup>24</sup> The GST tax imposes a flat tax at the highest federal estate tax rate (forty percent as of 2013 and beyond) on generation-skipping transfers.<sup>25</sup> The purpose of the GST tax is to make sure that property is taxed every time it shifts from generation to generation or skips a generation.<sup>26</sup>

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<sup>23</sup> See Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2466-68 (2006); Mary Louise Fellows, *Why the Generation-Skipping Transfer Tax Sparked Perpetual Trusts*, 27 CARDOZO L. REV. 2511 (2006), who noted that Congress “discouraged dynastic trusts with the GST tax, while at the same time encouraging them through the GST tax exemption.” Fellows, *supra*, at 2516. Fellows also argued that “the GST tax exemption put a ‘spark’ to the dynastic impulse already present.” Fellows, *supra*, at 2511.

<sup>24</sup> I.R.C. §§ 2601-2663.

<sup>25</sup> See *id.* §§ 2641, 2001.

<sup>26</sup> There are three types of generation-skipping transfers subject to the GST tax (unless exempted): taxable terminations, taxable distributions, and direct skips. See I.R.C. § 2611.

In general, a taxable termination occurs when an interest in trust property terminates, unless immediately after the termination, a non-skip person has an interest in the property or at no time after the termination may a distribution be made from the trust to a skip person. See I.R.C. § 2612(a). For example, in a trust to pay income to or for the benefit of the settlor’s daughter *D* for life, then principal to *D*’s children (the settlor’s grandchildren), the termination of *D*’s life interest would be a taxable termination. See Treas. Reg. § 26.2612-1(f) Ex. (4).

A taxable distribution occurs when income or principal is distributed from a trust to a skip person. See § I.R.C. 2612(b). Thus, for example, in a trust to pay the income to or for the benefit of the settlor’s son *S* for life, with a direction to pay half of the principal to *S*’s child, *GC*, when *GC* reaches age 35, the distribution of half of the principal to *GC* on *GC*’s 35th birthday would be a taxable distribution. See Treas. Reg. § 26.2612-1(f) Ex. (10).

A direct skip occurs when an interest in property is transferred to a skip person in a manner that is subject to the federal gift tax or federal estate tax. See I.R.C. § 2612(c). A skip

The GST exemption,<sup>27</sup> not the GST tax itself, sparked the perpetual-trust movement.<sup>28</sup> As its name implies, the GST exemption allows settlors to create trusts that are exempt from the GST tax. As of 2014, the ceiling on the exemption is \$5.34 million (twice that for a married couple).<sup>29</sup> Various estate-planning techniques can be used to leverage the amount exempted beyond the exemption's ceiling.<sup>30</sup> One of the simplest techniques is to fund the trust with life insurance policies or, better yet, second-to-die life insurance policies, both of which when contributed to the trust have a much lower value than the ultimate payoff. And, a GST-exempt trust retains its exemption no matter how much the trust's post-creation value appreciates above the maximum exemption amount.

When Congress granted the exemption, it failed to impose a durational limit on exempt trusts. Congress relied on state perpetuity laws to supply that limit. In hindsight, the reliance on state perpetuity laws was badly misplaced.<sup>31</sup> At the instigation of state banking groups

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person is defined in I.R.C. § 2613 as (1) a natural person assigned to a generation that is two or more generations below the generation assignment of the transferor or (2) a trust if all interests in the trust are held by skip persons or if there is no person holding an interest in the trust and at no time after the transfer may a distribution be made from the trust to a non-skip person. Thus, for example, a gift to a grandchild would be direct skip. *See* Treas. Reg. § 26.2612-1(f) Ex. (1).

<sup>27</sup> I.R.C. § 2631.

<sup>28</sup> *See* Schanzenbach & Sitkoff, *supra* note 23 *passim*. In a 1984 statement before the House Committee on Ways and Means, Raymond H. Young, Chairman, Generation-Skipping Transfer Tax Subcommittee, Boston Bar Association, predicted that the GST exemption would result in a "substantial increase in the establishment of generation skipping trusts." Young, however, was referring to generation-skipping trusts "within the period of the rule against perpetuities." He did not then foresee that state banking groups and estate-planning attorneys would lobby state legislatures to change perpetuity law to allow *perpetual* GST-exempt trusts. *See Generation-Skipping Transfer Tax: Hearing Before the H. Comm. On Ways and Means, 98<sup>th</sup> Cong. 335, 336-38 (1984).*

<sup>29</sup> The ceiling on the GST exemption is coordinated with the ceiling on the estate and gift tax exemption and was set at \$5 million in 2010. The increase to \$5.34 million resulted from an inflation adjustment that took effect at the beginning of 2012. *See supra* note 29 and accompanying text; *infra* note 80 and accompanying text.

<sup>30</sup> *See* RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 82-83 (2010); Iris J. Goodwin, *How the Rich Stay Rich: Using a Family Trust Company to Secure a Family Fortune*, 40 SETON HALL L. REV. 467, 490-97 (2010).

<sup>31</sup> *See* DEPARTMENT OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2015 REVENUE PROPOSALS 164 (March 2014), <http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY-2015.pdf> (last visited March 5, 2014): "At the time of the enactment of the GST provisions, the law of most (all but about three) states included the common law Rule Against Perpetuities (RAP) or some statutory version of it. The RAP generally requires that every trust terminate no later than 21 years after the death of a person who was alive (a life in

and estate-planning attorneys,<sup>32</sup> states began to pass legislation allowing settlors to create perpetual trusts—trusts that can last for several centuries<sup>33</sup> or even forever.<sup>34</sup>

Congress and state legislative bodies have therefore combined to set the perpetual-trust movement in motion. Although Congress did not intend to do so, whereas the state legislative bodies acted deliberately, the primary responsibility still rests with Congress. By creating, albeit inadvertently, a tax advantage for trusts that can remain tax exempt for centuries, Congress is the legislative body that facilitated the movement.<sup>35</sup> Summing up, the *ALI's Property Restatement Third* concludes: “An unintended consequence of tax law should not determine policy on so fundamental a matter as state perpetuity law . . . .”<sup>36</sup>

But Congress has not acted to close the tax loophole,<sup>37</sup> and the perpetual-trust movement is in full bloom. With state perpetuity laws out of the way, the wealthy created and continue to create perpetual

being) at the time of the creation of the trust. Many states now either have repealed or limited the application of their RAP statutes, with the effect that trusts created subject to the law of those jurisdictions may continue in perpetuity. (A trust may be sited anywhere; a grantor is not limited to the jurisdiction of the grantor's domicile for this purpose.) As a result, the transfer tax shield provided by the GST exemption effectively has been expanded from trusts funded with \$1 million (the exemption at the time of enactment of the GST tax) and a maximum duration limited by the RAP, to trusts funded with \$5.34 million and continuing (and growing) in perpetuity.”

<sup>32</sup> See Edward J. McCaffery, *The Dirty Little Secret of (Estate) Tax Reform*, 65 STAN. L. REV. ONLINE 21, 26 (2012) (“Who benefits [from perpetual trusts]? .... [A] very large class of trust companies and other financial intermediaries.”); Schanzenbach & Sitkoff, *supra* note 23, at 2479 (“[L]awyers and bankers [in many states] began agitating for repeal [of the Rule Against Perpetuities] after the 1986 tax reform, once they began to perceive a loss of business to other states.”); Joel C. Dobris, *Changes in the Role and the Form of the Trust at the New Millennium, or, We Don't Have to Think of England Anymore*, 62 ALB. L. REV. 543, 572 (1998) (“When the bankers want something, they get it.”); Turnier & Harrison, *supra* note 7.

<sup>33</sup> One-thousand years in Colorado, Utah, and Wyoming; 500 years in Arizona; 365 years in Nevada; 360 years in Alabama, Florida, and Tennessee.

<sup>34</sup> Alaska, Delaware, District of Columbia, Idaho, Illinois, Kentucky, Maine, Maryland, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, South Dakota, Virginia, and Wisconsin.

<sup>35</sup> See Ira Mark Bloom, *How Federal Transfer Taxes Affect the Development of Property Law*, 48 CLEV. ST. L. REV. 661, 673 (2000) (“The very recent perpetuities repeal movement is the best example of how federal transfer tax laws affect the development of property law in the worst of ways.”). See also Ira Mark Bloom, *The GST Tax Tail is Killing The Rule Against Perpetuities*, TAX NOTES 569 (April 24, 2000).

<sup>36</sup> 3 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS p. 568 (2011) [hereinafter ALI'S PROPERTY RESTATEMENT THIRD].

<sup>37</sup> See *supra* note 3 and accompanying text.

trusts in significant numbers.<sup>38</sup> An empirical study found that roughly \$100 billion in trust assets had flowed into states allowing perpetual trusts.<sup>39</sup> The study was based on data through 2003 from the annual reports that institutional trustees file with federal banking authorities. Considerably more wealth has undoubtedly moved into these states in the years following 2003.<sup>40</sup> Moreover, the \$100 billion figure undercounts the actual value of trust assets flowing into these states, because the sources on which the study was based were reports from federal regulatory agencies.<sup>41</sup> These reports contain no data on trusts in which the trustee is a family trust company, organized under state law for the limited purpose of administering trusts of one family. Family trust companies, which are becoming popular vehicles for administering perpetual trusts of the very wealthy,<sup>42</sup> are regulated if

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<sup>38</sup> Charitable trusts, by contrast, have traditionally been allowed to operate in perpetuity (and many do), but charitable trusts are subject to two safeguards that make the perpetuity tolerable: (1) the public benefit standard and (2) judicial modification under cy pres when circumstances cause the settlor's design to become outmoded. *See* RESTATEMENT (THIRD) OF TRUSTS §§ 28, 67 (2003); UNIF. TRUST CODE §§ 405, 413. .

<sup>39</sup> *See* Robert H. Sitkoff & Max Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 410 (2005). The study found that the states that attracted the most perpetual-trust business were those that do not tax trust income produced by funds originating from out of state. *See id.* States that levy an income tax on trust funds attracted from out of state experienced no observable increase in trust business. *See id.* at 420.

The \$100 billion trust figure did not represent the value of GST-exempt perpetual trusts. It appears that the payoff for institutional trustees operating in these perpetual-trust states is that "high net worth clients" create perpetual trusts up to the GST exemption limit and also move the greater bulk of their wealth into non-exempt trusts with the same institutional trustee. *See* MADOFF, *supra* note 30, at 80-82 (noting that "Congress created a marketing bonanza for banks and trust companies" and that perpetual trusts have "been tremendously profitable for banks and other financial service companies, which can generate large fees administering these long term trusts.").

<sup>40</sup> Writing in 2011, the year after Congress raised the exemption to \$5 million (*see supra* note 29), Michael Graetz noted that the increase prompted the wealthy to move even more assets into perpetual trusts: "I know of more than \$1 billion in New York City alone." Michael J. Graetz, *The Politics and Policy of the Estate Tax—Past, Present, and Future* 11 (Yale Law & Economics Research Paper No. 425, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1755161](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1755161). From 1990 to 1991, Professor Graetz served as Deputy Assistant Secretary for Tax Policy in the Treasury Department. *See also* WILMINGTON TRUST, A WINDOW OF OPPORTUNITY: HARNESSING THE POWER OF A DELAWARE DYNASTY TRUST, [https://www.wilmingtontrust.com/repositories/wtc\\_sitecontent/PDF/Window\\_of\\_Opportunity.pdf](https://www.wilmingtontrust.com/repositories/wtc_sitecontent/PDF/Window_of_Opportunity.pdf) (last visited Aug. 17, 2012) ("Using the increased exemptions to fund a trust, particularly a Delaware Dynasty Trust, can be a great way to benefit future generations.").

<sup>41</sup> *See* Sitkoff & Schanzenbach, *supra* note 39, at 387-88.

<sup>42</sup> *See* Goodwin, *supra* note 30, at 467-68 (noting that family trust companies are generally thought to be appropriate only for families with a net worth of at least \$200 million). *See also* Alan V. Ytterberg & James P. Weller, *Managing Family Wealth Through*

at all by state law,<sup>43</sup> not federal law, and consequently do not report to federal agencies.

#### IV. FROM HERE TO ETERNITY: PERPETUAL TRUSTS IN ACTION<sup>44</sup>

The perpetual trusts that are now in existence are only in their first, second, or third decades, so experience with them as they continue past the boundary set by traditional perpetuity law is lacking. Nevertheless, some projections can be made, since the prototypical perpetual trust is a discretionary trust for the benefit of the settlor's descendants from time to time living forever (or for several centuries).<sup>45</sup>

##### A. Genetic Dilution

With each step down the generational ladder, the settlor's genetic relationship with the descendant-beneficiaries will decline rather precipitously. On average, and disregarding nongenetic descendants such as adoptees, a settlor's genetic relationship with his or her descendants is cut in half at each succeeding generation. At the 14th generation (i.e., the generation born about 300 years after the settlor's death), the settlor's genetic relationship is reduced to about 0.0061 per cent, which—due to our common origins—is about the same relationship one has with any randomly selected member of the population.<sup>46</sup>

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*a Private Trust Company*, 36 ACTEC L.J. 623, 631-32 (2010).

<sup>43</sup> See Goodwin, *supra* note 30, at 474-75 (noting that family trust companies are lightly regulated by state law in some states and unregulated by state law in other states).

<sup>44</sup> Portions of Part IV draw on Lawrence W. Waggoner, *From Here to Eternity: The Folly of Perpetual Trusts* (Univ. of Michigan Public Law and Legal Theory Working Paper No. 259, 2011, updated May 2014), available at <http://ssrn.com/abstract=1975117>. The *Folly* essay questions whether the state legislators who vote to authorize perpetual trusts and the wealthy who create them have thought through what are allowing or putting in place. The essay was featured in the following article in the Wall Street Journal: John Koten, *You're Dead, But Still in Control*, WSJ.MONEY 32 (Spring 2013).

<sup>45</sup> See RICHARD W. NENNO, DELAWARE DYNASTY TRUSTS, TOTAL RETURN TRUSTS, AND ASSET PROTECTION TRUSTS 182-84 (2006).

<sup>46</sup> See John H. Beckstrom, *Sociobiology and Intestate Wealth Transfers*, 76 NW. U. L. REV. 216, 232-33 (1981), citing, at 233, RICHARD DAWKINS, THE SELFISH GENE 100 (1976). See also Alina Dizik, *Not Your Grandmother's Genealogy Hobby*, WALL ST. J., Dec. 1, 2011, at D3 ("If you go back far enough, you're probably connected [genetically] to everyone you know.").

### B. Beneficiary Proliferation

As the settlor's genetic relationship with the beneficiaries diminishes, the number of descendant-beneficiaries will proliferate geometrically.<sup>47</sup> One hundred and fifty years after creation, a perpetual trust could have about 450 living beneficiaries; after 250 years, more than 7,000 living beneficiaries; after 350 years, about 114,500 living beneficiaries.<sup>48</sup> This means that 350 years after creation, Michigan Stadium or the Rose Bowl would not be large enough to hold them all. The beneficiaries, each with standing to bring a lawsuit against the trustee for violation of any of the trustee's fiduciary duties, would have to book Rungrado May Day Stadium in

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<sup>47</sup> For simplicity, and because there appears to be no empirical evidence on point, the projections in the text disregard the possibility of two descendants of the settlor having children together, in a marital relationship or otherwise. To the extent that two of the settlor's descendants have children together, the geometric proliferation of the settlor's descendants will be dampened, because each pair of parents will, in effect, occupy the place of one descendant in the family tree. Take, for example, two distant cousins. Although they are both descendants of the settlor, they might or might not know that and therefore might or might not know that they are related to one another. If they have children together, they will only have two children on average rather than two each, and the dampening effect will cascade down the affected descending lines. Moreover, the dampening effect will be greater the earlier it happens and the more often it happens. Although marriage between first cousins is prohibited in about half of the states (*see* Wikipedia, *Cousin Marriage Law in the United States by State*, [http://en.wikipedia.org/wiki/Cousin\\_marriage\\_law\\_in\\_the\\_United\\_States\\_by\\_state](http://en.wikipedia.org/wiki/Cousin_marriage_law_in_the_United_States_by_state) (last visited Jan. 21, 2012)), marriage between more distant relatives is not prohibited. The phenomenon of two relatives having children together also affects the proliferation of ancestors, as described in Wikipedia, *Pedigree Collapse*, [http://en.wikipedia.org/wiki/Pedigree\\_collapse](http://en.wikipedia.org/wiki/Pedigree_collapse) (last visited Jan. 21, 2012). Although the phenomenon discussed in this footnote could lead to fewer beneficiaries than projected in the text, another phenomenon—increased longevity, resulting in four or more generations living at any one time—cuts the other way. *See infra* note 55. My thanks to Howard Helsing for pointing out to me the possibility of two descendants of the settlor having children together.

<sup>48</sup> The projections are based on the following averages: life expectancy of 75 years, two children per couple, and 25-year separation between generations. The projections are also based on the assumption that the trust was created when the settlor had two children and four grandchildren.

In Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 U.C.L.A. L. REV. 1303, 1339 (2003), the authors greatly underestimate the growth of the number of beneficiaries. They say that there will only be 16 beneficiaries after 100 years. Like the projections in the text above, they assume two children per family. Under that assumption, the only way that such a trust could only have 16 beneficiaries after 100 years—assuming they mean 100 years after the settlor's death—would be if they only count the senior generation. In point of fact, three or more generations of descendants are likely to be living at the same time, all of whom are permissible recipients of income and/or corpus, which makes them beneficiaries of the trust. Consequently, 100 years after the settlor's death, there are likely to be at least 16 living members of the senior generation, 32 living members of the middle generation, and 64 living members of the junior generation—112 beneficiaries in all.

Pyongyang, North Korea, or Salt Lake Stadium in Kolkata, India, if they were to get together for a meeting.<sup>49</sup>

Disputes seem inevitable. A trustee operates under a strict duty to distribute trust funds only to those persons who qualify as beneficiaries under the terms of the trust. A trustee also operates under the duty of impartiality. In discharging the duty of impartiality, “a trustee will often find it desirable, and sometimes important or even necessary, to consult with beneficiaries and obtain information from them concerning their financial needs and circumstances and perhaps their preferences concerning matters of trust administration.”<sup>50</sup>

### C. Benefiting Strangers

As the trust drifts deeper and deeper into its second and third centuries and beyond, and long after the settlor and the attorney responsible for proposing and drafting the trust have died, the beneficiaries will, to be sure, share a common ancestor, but their common ancestor will be very remote and they will have branched into thousands of individual three- or four-generation families basically unaware of their relationship with all but the closest of the other branches. Readers of this article can be expected to know their brothers and sisters (at least those of the whole blood<sup>51</sup>) and their descendants, probably their first cousins and their descendants, and possibly even their second cousins and some or all of their descendants. But few would know or know of their third or fourth cousins (descendants of their great-great-grandparents or of their great-great-great-grandparents), let alone the tens of thousands of their remote relatives in more distant branches.<sup>52</sup>

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<sup>49</sup> See Wikipedia, *List of Stadiums by Capacity*, [http://en.wikipedia.org/wiki/List\\_of\\_stadiums\\_by\\_capacity](http://en.wikipedia.org/wiki/List_of_stadiums_by_capacity) (last visited Oct. 17, 2011).

<sup>50</sup> RESTATEMENT (THIRD) OF TRUSTS § 79 cmt. d (2007). For more on trustee duties and risks of liability regarding perpetual trusts, see 3 ALI'S PROPERTY RESTATEMENT THIRD, *supra* note 36, at pp. 558-60. Note also that the Uniform Trust Code, in a bracketed provision, requires the trustee to notify *all* qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, the identity of the trustee, and their right to require trustee's reports, and provides that this duty of notification cannot be overridden by the terms of the trust. See UNIF. TRUST CODE § 105(b)(3) (2010); Thomas P. Gallanis, *The Trustee's Duty to Inform*, 85 N.C. L. REV. 1595 (2007).

<sup>51</sup> In an age of multiple marriages and other formal and informal multiple relationships, some might not know or know of all of their half brothers and sisters.

<sup>52</sup> On one author's use of genealogy websites to discover that he has thousands of living remote relatives with whom he has no personal relationships, see A.J. Jacobs, *Are You*

Whether or not politics still makes strange bedfellows,<sup>53</sup> perpetual trusts certainly do. Imagine a perpetual trust in which the more-than-100,000 living beneficiaries include President Barack Obama and his descendants and former President George H.W. Bush and his descendants (including former President George W. Bush). Or, a perpetual trust in which the more-than-100,000 living beneficiaries include President Obama and his descendants, former Vice President Richard Cheney and his descendants, and the living descendants of former President Harry S. Truman. Both trusts would exist and still be operating today if Samuel Hinckley, who died in Massachusetts in 1662, had created a perpetual trust for his descendants and if Maren Duvall, who died in Maryland in 1694, had created a perpetual trust for his descendants.<sup>54</sup>

#### *D. Table Projecting Settlor's Descending Line Through the Twentieth Generation*

The following table projects a settlor's descending line through the twentieth generation and shows the number of descendants and their genetic relationship to the settlor at each generational level. The number of living beneficiaries is calculated by adding the number of descendants born in a generation to the number of descendants born in the two prior generations.<sup>55</sup> For example, the projection of about

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*My Cousin?*, N.Y. TIMES, Jan. 31, 2014, [http://www.nytimes.com/2014/02/01/opinion/sunday/are-you-my-cousin.html?\\_r=1](http://www.nytimes.com/2014/02/01/opinion/sunday/are-you-my-cousin.html?_r=1).

<sup>53</sup> The maxim that politics makes strange bedfellows was coined by the American essayist Charles Dudley Warner (1829-1900).

<sup>54</sup> The distant relationships between President Obama and former Presidents Bush and Truman and former Vice-President Cheney were first chronicled on the website of the New England Historic Genealogical Society, <http://www.newenglandancestors.org/about/7320.asp> (last visited Aug. 2, 2009; website no longer available) (print copy on file with author). The website also noted that other distant relatives of President Obama include the following deceased individuals and their descendants: President Gerald R. Ford (common ancestor: Joseph Holley, who died in Massachusetts in 1647); President Lyndon B. Johnson (common ancestor: Philip Ament, who died in Kentucky in 1836); President James Madison, Jr. (common ancestor: Edwin Conway, who died in Virginia in 1675); British Prime Minister Sir Winston Churchill (common ancestor: George Allen, who died in Massachusetts in 1648); and Confederate General Robert E. Lee (common ancestor: Richard Eltonhead, who died in Lancashire, England, after 1664). Information regarding the ancestry of all American presidents is collected in GARY BOYD ROBERTS, ANCESTORS OF AMERICAN PRESIDENTS (2009).

<sup>55</sup> Although the possibility of two relatives having children together in a descending line will dampen the geometric proliferation of descendants (*see supra* note 47), the conservative assumption that only three generations of descendants will be living at any one time cuts the other way. Even today, four-generation families are increasingly common, and

114,500 living beneficiaries 350 years after the trust is created is calculated by adding the number of descendants born in the 16th generation (65,536) to the number of descendants born in the 15th generation (32,768) and in the 14th generation (16,384). The assumption is that 350 years after the trust is created, there will be about 16,384 living members of the senior generation, about 32,768 living members of the middle generation, and about 65,536 living members of the youngest generation, all of whom would be beneficiaries of a discretionary trust to distribute income or principal or both to or for the benefit of the settlor’s descendants living from time to time.

Gener- ation	Settlor’s Descendants Projected Through the 20th Generation	Number of Years Born After Settlor’s Death	Number of Descendants Per Generation	Genetic Relationship to Settlor
1st	Children	Settlor Alive	2	50%
2nd	Grandchildren	Settlor Alive	4	25%
3rd	Great-grandchildren	25	8	12.5%
4th	Great-great-grandchildren	50	16	6.25%
5th	Great-great-great-grandchildren	75	32	3.125%
6th	Great-great-great-great- grandchildren	100	64	1.5625%
7th	Great-great-great-great-great- grandchildren	125	128	0.78125%
8th	Great-great-great-great-great-great- grandchildren	150	256	0.390625%
9th	Great-great-great-great-great-great- great-grandchildren	175	512	0.1953125%
10th	Great-great-great-great-great-great- great-great-grandchildren	200	1,024	0.0976562%

if, as expected (*see, e.g.,* SONIA ARRISON, 100 PLUS: HOW THE COMING AGE OF LONGEVITY WILL CHANGE EVERYTHING 21-47 (2011)), longevity increases over the next several centuries, five- or maybe six-generation families might become common. Assuming that all the other assumptions (such as the number of children per family and the 25-year interval between generations) remain the same, the existence of four-, five-, or even six-generation families would cause the number of living beneficiaries at any one time to be greater than projected.

11th	Great-great-great-great-great-great-great-great-great-grandchildren	225	2,048	0.0488281%
12th	Great-great-great-great-great-great-great-great-great-great-grandchildren	250	4,096	0.024414%
13th	Great-great-great-great-great-great-great-great-great-great-great-grandchildren	275	8,192	0.012207%
14th	Great-great-great-great-great-great-great-great-great-great-great-great-grandchildren	300	16,384	0.0061035%
15th	Great-great-great-great-great-great-great-great-great-great-great-great-great-grandchildren	325	32,768	0.0030517%
16th	Great-great-great-great-great-great-great-great-great-great-great-great-great-great-grandchildren	350	65,536	0.0015258%
17th	Great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-grandchildren	375	131,072	0.0007629%
18th	Great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-grandchildren	400	262,144	0.0003814%
19th	Great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-grandchildren	425	524,288	0.0001907%
20th	Great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-grandchildren	450	1,048,576	0.0000953%

Is the beneficiary proliferation projected above inevitable? Some model perpetual-trust documents incorporate an “escape clause” in the form of a nongeneral power of appointment granted to each descendant-beneficiary or perhaps to the senior member of each branch to distribute his or her share of trust principal outright to his or her descendants (or perhaps to a broader group of permissible appointees).<sup>56</sup> For tax reasons, these powers must be nongeneral, meaning that the powerholder cannot withdraw assets for his or her own benefit.<sup>57</sup> Because it is impossible to predict how often these

<sup>56</sup> See, e.g., NENNO, *supra* note 45, at 183.

<sup>57</sup> See I.R.C. §§ 2041, 2514. Powers are nongeneral if the powerholders cannot

powers exist and will actually be exercised, the most that can be said is that the number of beneficiaries projected above will be reduced to the extent that one or more beneficiaries exercises the power.<sup>58</sup> A deterrent to exercise is that any exercise constitutes a partial termination of the trust, and the amounts the powerholder directs to be distributed to his or her descendants or other permissible appointees lose the tax umbrella of the GST exemption. Note also that the typical perpetual trust is a discretionary trust, so escape clauses pose a potential source of dispute and possible litigation: determining a powerholder's exact share of principal. Each exercise or partial exercise requires a recalculation of the powerholder's share and poses a potential source of litigation over the accuracy of the recalculation. Calculations and recalculations are not likely to be problematic in the first few generations, but are likely to become more and more disputable the deeper down the generational ladder the trust goes as the family divides into hundreds and then thousands of branches.

#### *E. Other Concerns*

Genetic dilution and beneficiary proliferation are not the only concerns associated with perpetual trusts.<sup>59</sup> Other concerns include rising management costs, trust document obsolescence, and trustee turnover.

*1. Rising management costs.* As these trusts continue to operate beyond and then far beyond the traditional perpetuity boundary of about a century, the costs of trust administration could become significant and be a drag on performance. As the settlor's descending line divides and redivides into hundreds and then thousands of

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distribute assets to themselves, their estates, their creditors, or the creditors of their estates. See ALI'S PROPERTY RESTATEMENT THIRD, *supra* note 36, § 17.3; UNIF. POWERS OF APPOINTMENT ACT § 102 (2013). For rules governing the exercise of a nongeneral power, see ALI'S PROPERTY RESTATEMENT THIRD, *supra* note 36, § 19.14; UNIF. POWERS OF APPOINTMENT ACT § 305 (2013).

<sup>58</sup> One of the architects of the perpetual-trust movement cautions against exercise: "[G]etting assets out of a trust is as easy as getting toothpaste out of a tube, while putting assets back into a trust is as difficult as trying to get toothpaste back into the tube." Garrett Moritz, Note, *Dynasty Trusts and the Rule Against Perpetuities*, 116 HARV. L. REV. 2588, 2605 (2003) (Jan. 9, 2003, telephone interview by Moritz with Jonathon G. Blattmachr).

<sup>59</sup> Lucy Marsh has written that the genetic dilution and beneficiary proliferation should "in [themselves], demonstrate the foolishness of Dynasty Trusts." See Lucy A. Marsh, *The Demise of Dynasty Trusts: Returning the Wealth to the Family*, 5 EST. PLAN. & CMTY. PROP. L.J. 23, 50 (2012-2013).

branches, the trustee would have to employ and assign more and more trust officers, each with primary operational responsibility—aided by ever-advancing technologies—for a manageable number of branches. The terms of the trust might attempt to anticipate this problem by providing that the original trust be divided and redivided into sub-trusts or separate shares, perhaps as each member of the senior generation of a branch dies. If the terms of the trust do not so provide, the original trust would by necessity have to be divided and redivided *de facto* into multiple sub-trusts or separate shares. Still another possibility is for the fiduciary to exercise a “decanting power” to divide and redivide the trust into sub-trusts.<sup>60</sup> Because the aggregate number of beneficiaries of all of the sub-trusts or shares would equal the number of beneficiaries of a single trust, the result would constitute a change in form only and, in any event, would not slow down the severe genetic dilution that occurs with the birth of each new generation.

Just as disputes seem inevitable concerning the identity of the beneficiaries,<sup>61</sup> they also seem inevitable concerning the proper manner of the hundreds and maybe thousands of divisions, redivisions, and re-redivisions that the trustees will have to make over the centuries. Ironically, as trust administration becomes more and more cumbersome and litigation prone, the trustees themselves—whose long-deceased and forgotten predecessors had lobbied so hard to capture the perpetual-trust business—might find it necessary to mount an effort to change current trust law by lobbying state legislatures to grant them the power to modify or terminate the

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<sup>60</sup> A “decanting power” is a fiduciary power of appointment endemic in discretionary trusts that allows the trustee—without judicial oversight—to modify the terms of the original trust by creating a new trust with different terms. Under the *ALI’s Property Restatement Third*, the holder of a “decanting power” cannot exercise the power beyond its scope and the holder’s exercise is subject to fiduciary obligations. See *ALI’S PROPERTY RESTATEMENT THIRD*, *supra* note 36, § 17.1 cmt. g; § 19.14 cmts. f & g(4); § 19.15; *Morse v. Kraft*, 468 Mass. 92, 95 (2013) (citing the *ALI’s Property Restatement Third* § 17.1 cmt. g with approval); Lawrence W. Waggoner, *What’s in the Third and Final Volume of the New Restatement of Property That Estate Planners Should Know About*, 38 *ACTECLJ* 23, 40-41 (2012). See also *RESTATEMENT (THIRD) OF TRUSTS* § 50(2003). The Treasury Department and the IRS are considering the tax consequences of some of the more aggressive uses of the “decanting power” under non-uniform “decanting” statutes. See IRS Notice 2011-101, <http://www.irs.gov/pub/irs-drop/n-11-101.pdf> (last visited Jan. 8, 2012). The Uniform Law Commission is currently working on a uniform trust decanting act. See UNIF. TRUST DECANTING ACT (now in draft form), <http://www.uniformlaws.org/Committee.aspx?title=Trust%20Decanting>.

<sup>61</sup> See *supra* note 50 and accompanying text.

trusts or by petitioning state courts to modify or terminate them.<sup>62</sup>

2. *Trust document obsolescence.* State-of-the-art perpetual-trust documents of today are considered modern, sophisticated, and up-to-date.<sup>63</sup> Will those documents be looked upon as modern, sophisticated, and up-to-date centuries from now? Consider the devices used centuries ago by English landowners to control family estates through subsequent generations. Such devices, which were then considered modern, sophisticated, and up-to-date, first took the form of the unbarrable entail and, after the entail became barrable, the strict settlement.<sup>64</sup> These devices and the terminology associated with them became obsolete long ago. If the past is any guide to the future, an early 21st century perpetual-trust document will seem as obsolete to those in distant centuries as a 17th century document appears to us today.<sup>65</sup> Moreover, a perpetual-trust document drafted today will often define the class of descendants according to time-of-creation standards, standards that run the serious risk of becoming out of date as concepts of family change over time. No trust drafted in 1650 or

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<sup>62</sup> See Dukeminier & Krier, *supra* note 48, at 1339-42. Trustees might seek to apply the doctrine of equitable deviation, which authorizes a court to modify the terms of a trust if, due to circumstances not anticipated by the settlor, the modification will further the purposes of the trust. See RESTATEMENT (THIRD) OF TRUSTS § 66 (2003) (unanticipated circumstances); UNIF. TRUST CODE § 412 (unanticipated circumstances). Whether the equitable-deviation doctrine can be used to modify a perpetual trust has yet to be decided. Alternatively, trustees might seek to extend the charitable trust doctrine of cy pres (*see supra* note 38) to private trusts. See RESTATEMENT (THIRD) OF TRUSTS § 67 (2003) (cy pres); UNIF. TRUST CODE § 413 (cy pres). Far more likely, trustees would use their “decanting power” to modify the trust. *See supra* note 60 & *infra* text accompanying notes 109-110.

<sup>63</sup> For a model perpetual-trust document, *see, e.g.*, NENNO, *supra* note 45, at 182-94.

<sup>64</sup> *See, e.g.*, LLOYD BONFIELD, MARRIAGE SETTLEMENTS 1601-1740: THE ADOPTION OF THE STRICT SETTLEMENT (1983); JOHN HABAKKUK, MARRIAGE, DEBT, AND THE ESTATE SYSTEM: ENGLISH LANDOWNERSHIP 1650-1950, at 1-5, 17, 36, 46-47 (1994); SIMPSON, LEGAL THEORY, *supra* note 10, at 143-62 (contrasting the English and Scottish entails); EILEEN SPRING, LAW, LAND AND FAMILY: ARISTOCRATIC INHERITANCE IN ENGLAND, 1300 TO 1800 (1993).

<sup>65</sup> Ruth Deech also notes how the passage of time can make a trust document obsolete: “If a settlor or testator had total liberty to dispose of his property among future beneficiaries, the recipients, being fettered by his wishes, would never enjoy that same freedom in their turn. The liberty to make fresh rearrangements of assets is necessary not only in order to be rid of irksome conditions attached by earlier donors to the enjoyment of income but also in order to be able to manoeuvre in the light of new tax laws, changes in the nature of the property and in the personal circumstances of the beneficiaries, unforeseeable by the best-intentioned and most perspicacious of donors.” Ruth Deech, *Lives in Being Revived*, 97 LAW Q. REV. 593, 594 (1981). Some of the obsolescence problems Deech points to, especially the tax problems, might be cured today by the exercise of a “decanting power” (*see* Diana S.C. Zeydel & Jonathan G. Blattmachr, *Tax Effects of Decanting—Obtaining and Preserving the Benefits*, 111 J. TAX’N 288 (Nov. 2009)), or by judicial modification (*see infra* note 96).

earlier could have contained provisions anticipating the possibility of adopted children,<sup>66</sup> children of assisted reproduction, or children born to a surrogate mother, much less second-parent adoptions or posthumously conceived children. Likewise, no perpetual-trust document drafted today will be able to anticipate concepts of family and descent as they change and adjust over the next several centuries.

3. *Trustee turnover.* Another matter that should be of concern to the wealthy who create perpetual trusts is what entity is going to serve as trustee over these vast intervals? In an era in which banks and other financial institutions go out of business, merge, or are taken over by other banks or financial institutions,<sup>67</sup> the bank or financial institution originally selected will not likely continue in anything like its present form for the next 200 years, 300 years, or for eternity. Over vast intervals such as these, the identity, location, capabilities, and expertise of the trustee will likely change many times over. Trustee turnover is enough of a problem for a trust whose duration is within the traditional perpetuity limit of about a century. The problem will be far more acute for a trust spanning several centuries or lasting forever. As the beneficiaries grow into the tens of thousands and divide into thousands of branches mostly unknown to one another, the personnel and technology necessary to administer a trust with fifteen or fewer beneficiaries (two children, four grandchildren, and as many as eight great-grandchildren) will not look anything like the personnel and technology necessary to manage a trust with 100,000 or more beneficiaries. Settlers should be aware that the trustees will become much different entities than the ones they initially entrusted with their fortunes.

Settlers should also be aware that the trustees, whether they are or are not the ones initially entrusted with their fortunes, will have the power to modify the terms of the original trust through what has come to be known as the “decanting power.”<sup>68</sup>

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<sup>66</sup> Adoption was first authorized in England in 1926. *See* Adoption of Children Act 1926. In the United States, adoption began to be authorized in the mid-19th century. *See* E.W. CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 11 (1998).

<sup>67</sup> According to SNL Financial, “[m]ore than a dozen trust companies were swallowed by bigger institutions [in 2011].” Robin Sidel, *A Family Loses Its Faith in Trust*, WALL ST. J., March 22, 2012, at C3.

<sup>68</sup> *See supra* note 60; *infra* notes 109-110 and accompanying text.

V. THE AMERICAN LAW INSTITUTE DECLARES THE PERPETUAL-TRUST MOVEMENT “ILL ADVISED” AND LIMITS DEAD-HAND CONTROL TO TWO YOUNGER GENERATIONS<sup>69</sup>

The traditional limit on dead-hand control of a life in being plus twenty-one years allows trusts or other property arrangements to continue for about a century, which is an extraordinarily long period of time. Writing more than four decades ago, W. Barton Leach cautioned settlors and their lawyers against using the full perpetuity period:

I hasten to add that the wisdom of tying up property for anything like a century is quite another matter. Any lawyer whose wisdom is equal to his skill would surely advise against any such attempt. Such a lawyer could point out that it would have been utterly impossible for any testator dying in 1866 to foresee the events that have taken place in the succeeding century, and . . . any prediction as to what may occur in the century following 1966 would be even more unlikely to conform to reality.<sup>70</sup>

Regarding the wisdom of allowing property to be tied up, not for a “mere” century, but for many centuries and maybe forever, it is worth noting that the members of the American Law Institute discussed the perpetual-trust movement at their 2010 annual meeting and voted unanimously to adopt the following statement: “It is the considered judgment of the American Law Institute that the recent statutory movement allowing the creation of perpetual or near-perpetual trusts is ill advised.”<sup>71</sup> The farther a perpetual trust moves

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<sup>69</sup> Portions of Part V draw on Lawrence W. Waggoner, *Curtailing Dead-Hand Control: The American Law Institute Declares the Perpetual-Trust Movement Ill Advised* (Univ. of Michigan Public Law Working Paper No. 199, 2010), available at <http://ssrn.com/abstract=1614934>; Lawrence W. Waggoner, *The American Law Institute Proposes a New Approach to Perpetuities: Limiting the Dead Hand to Two Younger Generations* (Univ. of Michigan Public Law Working Paper No. 200, 2010), available at <http://ssrn.com/abstract=1614936>.

<sup>70</sup> W. BARTON LEACH, PROPERTY LAW INDICTED! 71 (1967).

<sup>71</sup> See 3 ALI’S PROPERTY RESTATEMENT THIRD, *supra* note 36, at p. 564; Lawrence W. Waggoner, *Curtailing Dead-Hand Control: The American Law Institute Declares the Perpetual-Trust Movement Ill Advised* (Univ. of Mich. Pub. Law Working Paper No. 199, 2010), available at <http://ssrn.com/abstract=1614934>. Mark Ascher was more blunt: He described the movement as “loony.” Mark L. Ascher, *But I Thought the Earth Belonged to the Living*, 89 TEX. L. REV. 1149, 1160 (2011) (reviewing LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE* (2009)).

For a defense of perpetual trusts, see Bridget J. Crawford, *Who Is Afraid of Perpetual Trusts?*, 111 MICH. L. REV. FIRST IMPRESSIONS 79 (2012). It bears noting that when Professor Crawford was in private practice with a large New York City law firm, she and a co-author praised what they called the “power of the new perpetual trusts now permissible

in time beyond the traditional perpetuity boundary of about a century, the more the trust will become little more than one for thousands upon thousands of strangers, not only to the long-deceased settlor but also mostly to each other.<sup>72</sup>

At the same annual meeting, the American Law Institute also took a fresh look at the traditional mechanism for limiting excessive dead-hand control and adopted a new approach to perpetuities.<sup>73</sup> The new approach limits dead-hand control to two younger generations. In general terms, the Restatement (Third) of Property: Wills and Other Donative Transfers (*ALI's Property Restatement Third*) provides that a trust or other donative disposition of property is subject to judicial modification to the extent that it does not terminate on or before the expiration of the perpetuity period. The perpetuity period expires at the death of the last living measuring life, defined as a group composed of the settlor and the beneficiaries of the disposition who are no more than two generations younger than the settlor. *In terms of a trust for direct descendants, the two-younger-generations rule means that a settlor can establish a trust for the benefit of his or her children and grandchildren, with ultimate distribution on the death of the last living grandchild to the settlor's then-living great-grandchildren and descendants of deceased great-grandchildren.*

Earlier, this article noted the three features of the common-law Rule that bear reexamination. The first—that the common-law Rule invalidated a contingent future interest on the basis of what might happen, not on the basis of what does happen—was remedied by the adoption of wait-and-see in the Restatement (Second) of Property: Donative Transfers (*ALI's Property Restatement Second*) and then in USRAP. The *ALI's Property Restatement Third* continues the wait-and-see approach but drops the two-tier feature. Under the *ALI's Property Restatement Third*, wait-and-see is applied without regard

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under Alaska law” and promoted them “for wealthy US citizens and non-US persons holding substantial US real property or stock.” See Jonathan G. Blattmachr & Bridget J. Crawford, *Wilderness No More: Alaska as the New “Offshore” Trust Jurisdiction*, AMICUS CURIAE 30, 30 (Nov. 1999), available at <http://journals.sas.ac.uk/amicus/article/view/1424> (last visited Aug. 17, 2012).

<sup>72</sup> As Ascher concluded, “in the final analysis, the only real beneficiaries will be trustees and the lawyers,” adding: “Is it any wonder that elements of the financial-services industry lobbied so hard for the necessary legislation?” Ascher, *supra* note 71, at 1161.

<sup>73</sup> See ALI'S PROPERTY RESTATEMENT THIRD, *supra* note 36, §§ 27.1 to 27.3; Lawrence W. Waggoner, *The American Law Institute Proposes a New Approach to Perpetuities: Limiting the Dead Hand to Two Younger Generations* (Univ. of Mich. Pub. Law Working Paper No. 200, 2010), available at <http://ssrn.com/abstract=1614936>.

to whether or not the contingent future interest would be valid under the common-law Rule. The old learning under the common-law Rule that has perplexed generations of law students would be relegated to the dustbins of legal history.

The *ALI's Property Restatement Third* also addresses the second and third features. The second feature is that the common-law Rule and its wait-and-see variant measures the allowable perpetuity period by lives in being at the creation of the interest (the measuring lives) plus twenty-one years. Requiring the measuring lives to be in being at the creation of the interest prevents the perpetuity period from adjusting to the trust and family circumstances, because that requirement often divides members of the same generation into measuring and non-measuring lives. Although trusts commonly confer lifetime benefits on members of one generation before passing benefits to the next generation, the life-in-being requirement means that only those members of a generation who are in being at the creation of the interest can be used to measure the perpetuity period. Members of the same generation who come into being later cannot be used. The *ALI's Property Restatement Third* replaces the “in being” requirement with a rule that measures the perpetuity period by generations. Basically, with certain qualifications and exceptions, the Rule—as promulgated in the *ALI's Property Restatement Third*—limits dead-hand control to granting benefits through but not beyond two generations younger than the settlor. The result is that the perpetuity period is more likely to be tailored to the individual trust and family circumstances.

The third feature of the common-law Rule and its wait-and-see variant is that the common law focuses only on the validity of a contingent future interest, not on the time when a trust or other donative disposition of property terminates. The Rule has been called a rule against remoteness of vesting. That mechanism, however, is satisfied if a contingent future interest vests in interest within the allowable period; it need not vest in possession. Consequently, a rule against remoteness of vesting is not directly aligned with the purpose of the Rule, which is to limit dead-hand control. The *ALI's Property Restatement Third* focuses on the time when the trust or other disposition of property terminates.<sup>74</sup> The time of termination as

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<sup>74</sup> The idea of changing the Rule Against Perpetuities to require termination on or before the expiration of the perpetuity period was first proposed by Daniel M. Schuyler and recently advocated by Thomas P. Gallanis. See Daniel M. Schuyler, *Should the Rule Against*

opposed to the time of vesting coordinates more purposively with the Rule's objective of limiting dead-hand control, because the time of termination is when the property comes under the control of the ultimate beneficiaries. Another benefit of shifting from the time of vesting to the time of termination is that the distinction between a contingent and a vested future interest—another feature of future interests law that has bedeviled generations of law students—becomes irrelevant.<sup>75</sup>

Judicial modification is an integral part of the Rule Against Perpetuities adopted in the *ALI's Property Restatement Third*, as it was under the *ALI's Property Restatement Second* and USRAP.<sup>76</sup> Under the *ALI's Property Restatement Third*, a trust or other donative disposition that does not terminate on or before the expiration of the perpetuity period is not invalid. The property does not return to and then through the estate of the long-deceased settlor. Instead, the trust or other donative disposition is subject to judicial modification “in a manner that most closely approximates the transferor's manifested plan of distribution and is within the [*ALI's Property Restatement Third's* perpetuity period].”<sup>77</sup> In most cases, the form of modification will accelerate the right to possession of the beneficiaries of the trust or other disposition.

As noted above, gone also is the two-tier approach. Under the *ALI's Property Restatement Third*, there is no need to test a disposition to see if it would have been valid at common law. Of course, any trust or other donative disposition whose terms require it

*Perpetuities Discard Its Vest?*, 56 MICH. L. REV. 683 (1958); Thomas P. Gallanis, *The Future of Future Interests*, 60 WASH. & LEE L. REV. 513, 549, 559-60 (2003).

<sup>75</sup> Another feature of the *ALI's Property Restatement Third* is that it classifies future interests on the basis of substance, not form. Categories no longer recognized are “executory interest,” “possibility of reverter,” “right of entry,” and “vested subject to defeasance.” A future interest is “either a reversion or a remainder” and is “either contingent or vested.” A “contingent” future interest is no longer defined as a future interest that is subject to a condition precedent, but rather as a future interest that “might not take effect in possession or enjoyment.” A “vested” future interest is no longer defined as a future interest that is subject to no condition or a condition subsequent, but a future interest that is “certain to take effect in possession or enjoyment.” See ALI'S PROPERTY RESTATEMENT THIRD, *supra* note 36, §§ 25.2, 25.3; Lawrence W. Waggoner, *The American Law Institute Proposes Simplifying the Doctrine of Estates* (Univ. of Michigan Public Law Working Paper No. 198, 2010), available at <http://ssrn.com/abstract=1612878>; Lawrence W. Waggoner, *Reformulating the Structure of Estates: A Proposal for Legislative Action*, 85 HARV. L. REV. 729 (1972).

<sup>76</sup> See RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 1.5 (1983); UNIF. STATUTORY RULE AGAINST PERPETUITIES § 3 (1986) (UNIF. PROBATE CODE § 2-903).

<sup>77</sup> ALI'S PROPERTY RESTATEMENT THIRD, *supra* note 36, § 27.2.

to terminate no later than the expiration of the two-younger-generations perpetuity period is valid from its inception and will never be subject to judicial modification.

*Illustration 1.* Settlor creates an irrevocable inter vivos trust, directing the trustee to pay the income “to my daughter *C* for life, then in equal shares to *C*’s children for their respective lives; on the death of each child, the proportionate share of trust principal of the one so dying shall be distributed by representation to the then living descendants of such child.” When Settlor created the trust, *C* had one child, *GC1*. After Settlor created the trust but before Settlor died, *C* and her husband (*H1*) were divorced. Subsequently, *C* remarried and she and her second husband (*H2*) had a child (*GC2*). Settlor then died. After Settlor’s death, *C* and *H2* had another child (*GC3*). *C* and *GC1* were in being at the creation of the trust but they have now died survived by *GC2* and *GC3*. *GC3* outlived *C*, *GC1*, and *GC2* by more than twenty-one years.

Under the *ALI’s Property Restatement Third*, the trust would be valid at its outset, because its terms require the trust to terminate no later than the death of the survivor of Settlor and Settlor’s last living grandchild. The trust will never be subject to judicial modification. The measuring lives would be Settlor, *C*, *GC1*, *GC2*, and *GC3*. If the measuring lives were limited to those in being at the creation of the interest, only Settlor, *C*, and *GC1* could qualify as measuring lives. Although *GC2* and *GC3* came into being after the creation of the trust, *GC2* and *GC3* would be measuring lives under the *ALI’s Property Restatement Third*, because *GC2* and *GC3* are beneficiaries who are related to Settlor in the second generation below Settlor’s generation. Treating *GC2* and *GC3* as measuring lives means that the trust would be valid and not subject to judicial modification.

To put the generations-based perpetuity period into perspective, it should be noted that the common-law Rule itself would not cut a two-generations trust short. In *Illustration 1*, the only effect of violating the common-law Rule would be to invalidate the remainder interest to *C*’s then-living descendants that was to take effect on the death of *C*’s last living child (Settlor’s grandchild), thus forcing the right to the trust principal to revert to Settlor’s estate on the death of *GC3* (Settlor’s last living grandchild). Because Settlor would typically have died many decades earlier, the final owners of the right to trust principal could only be determined by tracing the reversion through the estates of those successors who also died before the termination of the trust. It would not be unusual to find that some and perhaps most or all of the final owners were far removed from Settlor’s family. The two-generations approach does nothing more than save the validity of the remainder interest, thus preserving Settlor’s intention regarding the ultimate distributees of the trust and

removing the inefficiency of forcing the right to the trust principal to revert to and through Settlor's estate and then through the estates of Settlor's successors.

Here is how a perpetual trust would fare under the *ALI's Property Restatement Third*:

*Illustration 2.* Settlor creates an irrevocable inter vivos trust, directing the trustee to distribute the income at the trustee's discretion among Settlor's descendants from time to time living. The terms of the trust require the trust to terminate when Settlor no longer has any living descendants. On termination, the trustee is directed to distribute the trust principal to a specified charity. At the creation of the trust, Settlor had two adult children, *C1* and *C2*, and two grandchildren, *GC1* and *GC2*. After the trust was created, two more grandchildren, *GC3* and *GC4*, were born. *GC4* was born after Settlor's death.

Under the *ALI's Property Restatement Third*, the measuring lives would be Settlor and Settlor's children and grandchildren, *C1*, *C2*, *GC1*, *GC2*, *GC3*, and *GC4*. Suppose that *GC4* was the last living measuring life and that *GC4* has now died, say at age 88. *GC4*'s death would mark the expiration of the perpetuity period. At *GC4*'s death, Settlor had fifty living descendants—eight great-grandchildren, sixteen great-great-grandchildren, and twenty-six great-great-great-grandchildren. The trust would be subject to judicial modification, because the trust did not terminate on or before the expiration of the perpetuity period. The court should modify the trust by requiring it to terminate on the death of *GC4* and order the trust principal to be distributed by representation to Settlor's descendants living when the perpetuity period expired. If Settlor's descending line had died out when or before the perpetuity period expired, no modification would be required, because the trust would have required distribution to the specified charity when Settlor's last living descendant died.

The objective of switching to a generations-based perpetuity period is not to produce a materially longer or shorter maximum period.<sup>78</sup> 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 settlor and can outlive the settlor 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 settlor's death and can outlive the settlor by many decades, maybe even a century, but not much more and often less. Although the length of the two periods

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<sup>78</sup> See 3 ALI'S PROPERTY RESTATEMENT THIRD, *supra* note 36, at pp. 569-70.

will be different in individual cases, the average length across all cases will probably work out to be about the same.

The generations-based perpetuity period will potentially be shorter than one based on lives in being if the settlor dies after the birth or conception of all of the beneficiaries of the settlor's trust who are members of the second generation below the settlor's generation. In the case of a trust benefiting the settlor's descendants, that situation is one in which the settlor dies after all of his or her grandchildren are born or in gestation. Due to increased longevity, many settlors live long enough to see all of their grandchildren and some of their great-grandchildren. Under the two-younger-generations-based perpetuity period, the measuring lives would include the grandchildren but would not include the in-being great-grandchildren. Under the lives-in-being-based perpetuity period, the measuring lives would not only include the grandchildren but would also include the in-being great-grandchildren.

The generations-based perpetuity period will potentially be longer than one based on lives in being if the settlor dies before the birth or conception of all of the beneficiaries of the settlor's trust who are members of the second generation below the settlor's generation. In the case of a trust benefiting the settlor's descendants, that situation is one in which the settlor dies before all of his or her grandchildren are born or in gestation. The situation in which a settlor does have one or more after-born grandchildren is likely to arise when one or more of the settlor's children has a second marriage and a second family, as depicted in Illustration 1. When there *is* an after-born grandchild, the two-generations approach potentially produces a longer perpetuity period than the in-being approach, but not appreciably longer, and has the overriding benefit of tailoring the period to the individual trust and family circumstance. The perpetuity period will not always be longer because, even in cases in which the settlor does have one or more after-born grandchildren, the two-generation perpetuity period will still not be longer than the lives-in-being period unless one or more of the after-born grandchildren outlives the settlor's in-being grandchildren.

In the case of a trust benefiting the descendants of a much younger sibling, there is a greater likelihood that the settlor will die before all of the siblings's grandchildren are born or in gestation. By contrast, in the case of a trust benefiting the descendants of a much older sibling, there is a far less likelihood that the settlor will die before all of the sibling's grandchildren are born or in gestation. The

two situations—younger sibling, older sibling—seem to cancel each other out.

Although the principal innovation of the *ALI's Property Restatement Third* is the imposition of a two-younger-generations limit on dead-hand control, the new *Restatement* incorporates other innovations. One is that there is no twenty-one-year period automatically tacked on at the end of the perpetuity period as there was at common law and under the *ALI's Property Restatement Second*. Although the tack-on twenty-one-year period was a period in gross and not tied to the actual minority of any beneficiary, it is generally understood that the twenty-one-year period was originally designed to allow the settlor to continue the trust or other disposition throughout the minority of a remainder beneficiary. Under the *ALI's Property Restatement Third*, the tack-on twenty-one-year period is replaced by a provision specifically targeted to an age contingency that has not yet been satisfied. If, upon the expiration of the perpetuity period, the share of a beneficiary is distributable upon reaching a specified age and the beneficiary is younger than the earlier of the specified age or the age of thirty, the beneficiary's share may, without judicial modification, be retained in trust until the beneficiary reaches or dies before reaching the earlier of the specified age or the age of thirty.

*Illustration 3.* Settlor dies, leaving a will that devises property in trust, directing the trustee to pay the income “to my son *C* for life, then to *C*'s children for the life of the survivor, and on the death of *C*'s last surviving child, to distribute the trust principal to *C*'s grandchildren who reach the age of 30.” At Settlor's death, Settlor had one child, *C*, and one grandchild, *GC1*. After Settlor's death, *C* had another child, *GC2*. *C* had no more children.

Under the *ALI's Property Restatement Third*, the measuring lives are *C*, *GC1*, and *GC2*. *C* died, survived by *GC1* and *GC2*. *GC1* then died, survived by *GC2*. *GC2* has now died. The perpetuity period expired at *GC2*'s death. At *GC2*'s death, *GC1* and *GC2* had three children, *GGC1*, *GGC2*, and *GGC3*. *GGC1* was then 28, *GGC2* was then 26, and *GGC3* was then 22. The shares of *GGC1*, *GGC2*, and *GGC3* may, without judicial modification, be retained in trust until each great-grandchild reaches 30 or dies before reaching 30. The same result would be reached if the specified age in Settlor's trust had been age 35. If the specified age in Settlor's trust had been age 25, the shares of *GGC1* and *GGC2* would be distributable immediately upon *GC2*'s death and the share of *GGC3* could be retained in trust until *GGC3* either reached the age of 25 or died before reaching 25.

In its final innovation, the *ALI's Property Restatement Third*

allows for one exception to the two-younger-generations limit. The *New Restatement* specifically authorizes a settlor to establish a trust or other property arrangement for the sole current benefit of a named individual who is more than two generations younger than the settlor, such as a great-grandchild. Requiring the beneficiary to be a named individual is intended to assure that the beneficiary is in being when the trust or other property arrangement is established. Among the types of trusts or other property arrangements that would come under this provision are a special-needs trust, a “529 educational savings plan,” a “Coverdale Education Savings Account,” a “section 2503(c) trust” for a minor, and a custodianship under the Uniform Transfers to Minors Act, the Uniform Gifts to Minors Act, or the Uniform Custodial Trust Act.

#### VI. IT’S UP TO CONGRESS TO FIX WHAT IT INSTIGATED

The primary responsibility for the perpetual-trust movement rests with Congress and the primary responsibility for stopping it also rests with Congress. Because of the continued inaction of Congress, the perpetual-trust floodgates, open far too long, remain open.

##### *A. The American Taxpayer Relief Act of 2012 Made the Problem Worse*

Faced with the prospect of across-the-board tax increases taking effect automatically on the first day of January 2013, Congress passed and the president signed the American Taxpayer Relief Act of 2012 (ATRA 2012).<sup>79</sup>

Had the higher tax rates taken effect, the ceiling on the estate, gift, and GST exemption would have dropped to \$1 million. Such a drop would have curtailed by about eighty percent the ability of the wealthy to fund perpetual trusts, but ATRA 2012 permanently extended the \$5 million ceiling, which—as adjusted for inflation—is \$5.34 million in 2014 (double that for a married couple).<sup>80</sup>

##### *B. Silence of the House Committee on Ways and Means*

As a stop-gap measure, ATRA 2012 did not purport to effect

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<sup>79</sup> Pub. L. No. 112-240, 126 Stat. 2313 (2013). Although Congress passed ATRA 2012 on January 1, 2013, and the president signed it into law the following day, its estate, gift, and GST tax provisions are effective for donative transfers made after December 31, 2012.

<sup>80</sup> See Rev. Proc. 2013-35 at 18, <http://www.irs.gov/pub/irs-drop/rp-13-35.pdf>.

comprehensive tax reform. If Congress is to impose a durational limit on the GST exemption, and hence put an end to the perpetual-trust movement for good, it might have to come as part of comprehensive tax reform. Until that happens, the tax incentive for creating perpetual trusts will remain in place, especially now that ATRA 2012 has made the \$5 million-plus ceiling on the exemption permanent.

On February 26, 2014, the House Ways and Means Committee unveiled its long-awaited proposal for comprehensive tax reform.<sup>81</sup> The proposal, however, neglects to address the GST exemption for perpetual trusts: The Committee divided its work into eleven working groups, but none dealt with estate, gift, and GST tax reform.<sup>82</sup> The prospect for enactment of comprehensive tax reform in this Congress—the 113th—appears bleak in any event.<sup>83</sup>

### *C. Treasury Proposal*

The only agency of the federal government that has publicly taken an interest in curtailing the GST exemption for perpetual trusts is the Treasury Department. As part of the Obama Administration's Fiscal Year 2012, 2013, and 2014 revenue proposals, and reiterated in its 2015 revenue proposals, the Treasury Department stated its position that the absence of a durational limit on the GST exemption is inconsistent with the purpose of the exemption and undermines the policy of the GST tax.<sup>84</sup> But Treasury's proposed solution is

<sup>81</sup> Tax Reform Act of 2014 (Discussion Draft), H.R., 113<sup>th</sup> Cong., 2d Sess., [http://waysandmeans.house.gov/uploadfiles/statutory\\_text\\_tax\\_reform\\_act\\_of\\_2014\\_discussion\\_draft\\_022614.pdf](http://waysandmeans.house.gov/uploadfiles/statutory_text_tax_reform_act_of_2014_discussion_draft_022614.pdf).

<sup>82</sup> For a list of the working groups, see <http://waysandmeans.house.gov/taxreform>.

<sup>83</sup> See, e.g., Lori Montgomery, *McConnell: Tax Reform is Dead*, WASH. POST WONKBLOG, Feb. 25, 2014, <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/02/25/breaking-mcconnell-kills-tax-reform/>.

<sup>84</sup> See DEPARTMENT OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2015 REVENUE PROPOSALS 164-65 (March 2014), <http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2015.pdf> (last visited March 5, 2014); DEPARTMENT OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2014 REVENUE PROPOSALS 143-44 (April 2013), <http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2014.pdf> (last visited March 5, 2014); DEPARTMENT OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2013 REVENUE PROPOSALS 81-82 (Feb. 2012), <http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2013.pdf> (last visited March 5, 2014); DEPARTMENT OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2012 REVENUE PROPOSALS 129-30, <http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2012.pdf> (last visited March 5, 2014).

disappointing because it is not as effective as it could and should be. Here is what Treasury proposes:

- (1) new trusts (i.e., those created on or after the effective date of enactment) would qualify for the GST exemption, but the exemption would expire ninety years after the trust was created; and
- (2) existing trusts (i.e., those created before the effective date of enactment) would continue to be GST-exempt unburdened by a durational limit.

The high-end estate-planning community would have little difficulty coping with the Treasury proposal for trusts created on or after the effective date. The key point is that perpetual trusts would still qualify for the GST exemption. The only difference would be that the exemption would expire ninety years after creation. Ninety years is a very long time. Because the whole tax system might change during the next several years, let alone the next ninety, the Treasury proposal encourages the super wealthy to create GST-exempt perpetual or potentially perpetual trusts, while at the same time keeping their options open.

So, post-effective-date GST-exempt trusts would likely take one of two forms. Some might be crafted with no termination date while others might be crafted with a ninety-year termination date, but either way the trustee would be granted the power to adjust the terms of the trust to take account of tax law as it changes over time.<sup>85</sup> The idea would be that if the GST tax and the ninety-year limit were no longer in effect as the trust neared its nine-decade mark, the trust could continue for centuries.<sup>86</sup> Only if the GST tax and the ninety-year limit were still in effect as the trust neared its nine-decade mark would the trustee have the option of avoiding GST tax by terminating the trust and distributing the assets on or shortly before expiration of the ninety-year limit.

The Treasury proposal, if enacted, would also undermine the

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<sup>85</sup> To be sure, less-shrewdly planned post-effective-date trusts might be crafted to terminate on or shortly before expiration of the 90-year period without any option of extending the term of the trust should the law change to make an extended trust more attractive, but word would spread quickly through the estate-planning community that this is not the preferred course.

<sup>86</sup> If the GST tax itself were to be repealed before 90 years are up, the trust could continue for centuries, although repeal would remove the tax-motivated purpose of the trust in the first place and Congress's interest in the perpetual-trust movement. Repeal would also provide an opportunity for the state legislatures to revisit the question whether they still think it is wise public policy to allow perpetual trusts.

perpetuity reforms recently adopted by the American Law Institute<sup>87</sup> as well as the earlier reform adopted in USRAP. By proposing a ninety-year durational limit and ignoring the two-younger-generations limit, the Treasury proposal would deal another blow to state-law perpetuity reform.<sup>88</sup> Although the ninety-year limit is undoubtedly derived from USRAP, it represents a misunderstanding of USRAP. As noted earlier, USRAP's ninety-year period was not applicable to all trusts, but only to that small percentage of trusts—mostly poorly-drafted trusts that did not contain a perpetuity-saving clause<sup>89</sup>—that (before the perpetual-trust movement took hold) could otherwise exceed the common-law period of a life in being plus twenty-one years.<sup>90</sup>

Because the Treasury proposal would only affect trusts created on or after the date of enactment, it would leave many trusts and much wealth exempt from GST tax for much longer than Congress originally intended. If the Treasury proposal becomes the solution of choice, congressional procrastination becomes even more critical: Wealth will continue to pile up in perpetually tax-exempt trusts until (and if) Congress decides to move.<sup>91</sup>

In addition, if enactment of the Treasury proposal would ever appear possible, the stampede would be on to get even more perpetual trusts in before the deadline. Word of a possible enactment would spread quickly through the estate-planning bar and through the listservs and websites of various organizations such as the American College of Trust and Estate Counsel and the Real Property Probate and Trust Law Section of the American Bar Association. Super-rich clients who were on the fence would be encouraged to establish GST-

<sup>87</sup> See *supra* Part V.

<sup>88</sup> Enactment of the Treasury proposal by Congress would likely pressure the Uniform Law Commission to revise USRAP to coincide with the federal durational limit, at least for post-effective-date GST-exempt trusts.

<sup>89</sup> A common-law perpetuity-saving clause provides that the trust must terminate no later than 21 years after the death of the last survivor of a group of individuals (often the settlor's descendants or the beneficiaries of the trust) who were in being when the trust was created.

<sup>90</sup> As the USRAP reporter and inventor of the 90-year wait-and-see period, I know this to be true. See *also supra* Part II.

<sup>91</sup> The amount of wealth already sheltered in perpetually tax-exempt trusts is estimated to be in the billions of dollars. See notes 6, 29, 39-40. See also Zachary R. Mider, *Moguls Rent South Dakota Addresses to Shelter Wealth Forever*, BLOOMBERGNEWS, Dec. 27, 2013, <http://www.bloomberg.com/news/2013-12-27/moguls-rent-south-dakota-addresses-to-dodge-taxes-forever.html> (reporting on wealthy families who have created dynasty trusts in South Dakota).

exempt perpetual trusts before the door closed on the opportunity.

Treasury could have blunted the ineffectiveness of its proposal if it had extended its proposal regarding new trusts to trusts in existence before the effective date, i.e., to provide that the GST exemption would expire ninety years after creation (or perhaps ninety years after the date of enactment). A ninety-year limit on the GST exemption for existing trusts would probably be constitutional.<sup>92</sup>

Had Treasury proposed a ninety-year limit on the GST exemption for both new and existing trusts, the above commentary regarding its proposal with respect to new trusts<sup>93</sup> would apply (with one exception) to existing trusts. The one exception is that trustees would likely have to seek judicial or non-judicial modification of the trusts to grant them power to avoid the GST tax by terminating the trust and distributing the assets on or shortly before expiration of the ninety-year limit,<sup>94</sup> but the need to seek and exercise that power would not arise until the trust neared its nine-decade mark and only then if the GST tax and the ninety-year limit were still in effect.

The proposal that Treasury sent to Congress, however, only applies a ninety-year limit on the GST exemption to new trusts, not to new and existing trusts. Congress has, in any event, not acted on Treasury's modest proposal.

#### *D. Proposed: An Effective Solution*<sup>95</sup>

I offer a solution that would be far more effective than the Treasury proposal. Congress should amend I.R.C. § 2631 (the section creating the GST exemption) to provide that:

- (1) new trusts (i.e., those created on or after the effective date of enactment) do not qualify for the GST exemption unless the terms of the trust or applicable local law require the trust to terminate within the “perpetuities period”; and
- (2) existing trusts (i.e., those created before the effective date of enactment) whose terms allow them to extend beyond the “perpetuities period” must be modified during a specified grace period<sup>96</sup> to require them to terminate within

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<sup>92</sup> See *infra* notes 104-105.

<sup>93</sup> See *supra* text accompanying notes 85-91

<sup>94</sup> See *infra* text accompanying notes 108-109.

<sup>95</sup> Portions of subpart D draw on Lawrence W. Waggoner, *Effectively Curbing the GST Exemption for Perpetual Trusts*, 135 TAX NOTES 1267 (Shelf Project June 4, 2012), available at <http://ssrn.com/abstract=2083804>.

<sup>96</sup> The *ALI's Property Restatement Third* provides that a donative document may be modified, in a manner that does not violate the donor's probable intention, to achieve the donor's tax objectives. See ALI'S PROPERTY RESTATEMENT THIRD, *supra* note 36, § 12.2

the “perpetuities period” or lose their GST exemption at the end of the grace period.

The “perpetuities period” should be defined—either in the statute or, more likely and probably preferably, in regulations—to embrace periods based in standard perpetuity law:<sup>97</sup> (1) the traditional common-law period (endorsed by USRAP) of a life in being plus twenty-one years (usually effected by a common-law perpetuity-saving clause included in the trust instrument<sup>98</sup>); (2) USRAP’s ninety-year wait-and-see period; and (3) the *ALI’s Property Restatement Third*’s two-younger-generations period, with special rules for cases in which the share of a beneficiary is distributable on reaching the specified age of thirty or younger and for trusts whose sole current beneficiary is a named great-grandchild.<sup>99</sup>

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(2003). This provision of the *ALI’s Property Restatement Third* is codified in the Uniform Trust Code and in the Uniform Probate Code. *See* UNIF. TRUST CODE § 416; UNIF. PROBATE CODE § 2-806. *See also* RESTATEMENT (THIRD) OF TRUSTS § 66 (2003) (Power of Court to Modify: Unanticipated Circumstances). Although these tax-modification sections contemplate judicial action, they could be adapted to a private trust to grant the trustee power to modify the terms of the trust without judicial approval. *See also id.* § 64 (2003) (Termination or Modification by Trustee, Beneficiary, or Third Party).

<sup>97</sup> For another purpose, a Treasury regulation already defines the “perpetuities period” as either the life-in-being-plus-21-years period or the 90-years period. *See* Treas. Reg. § 26.2601-1(b)(1)(v)(B)(2). This regulation was issued before the *ALI’s Property Restatement Third* adopted the “two-younger-generations” period.

<sup>98</sup> *See supra* note 89.

<sup>99</sup> *See* Waggoner, *supra* note 95, at 1270-71. It should be noted that the Joint Committee on Taxation once proposed a two-generations limit on the GST exemption. *See* STAFF REPORT, JOINT COMMITTEE ON TAXATION, OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES 393 (JCS-02-05, Jan. 27, 2005) (no longer available online; print copy on file with author). The Staff Report states: “Perpetual dynasty trusts are inconsistent with the uniform structure of the estate and gift taxes to impose a transfer tax once every generation. In addition, perpetual dynasty trusts deny equal treatment of all taxpayers because such trusts can only be established in the States that have repealed the mandatory rule against perpetuities.” The Staff Report then put forward the following proposal:

The proposal prohibits the allocation of the generation skipping tax exemption to a “perpetual dynasty trust,” except to the extent that the trust provides for distribution to beneficiaries in the generations of the transferor’s children or grandchildren. Under the proposal, the generation-skipping tax exemption effectively is limited to an exemption of a skip of one generation. A “perpetual dynasty trust” is defined as a trust whose situs (place of creation) is a State that either (1) has repealed the rule against perpetuities, (2) allows the creator of a trust to elect to be exempt from the rule against perpetuities and the creator so elects, or (3) has modified its rule against perpetuities to permit creation of interests for individuals more than three generations younger than the interest’s creator. If the situs of a trust is moved from a State that has retained the rule

Although, in states in which applicable state law does not require the trust to terminate within one of the three periods,<sup>100</sup> the settlor should be allowed to select one of the periods.<sup>101</sup> Each of the three periods has a basis in perpetuity law. Allowing trust settlors the option of selecting, in the trust document, which of the three periods (but not whichever period turns out to be the lengthiest of the three or the lengthiest of two of the three) best suits the terms of the trust would be consistent with the original purpose of the GST exemption. All three perpetuity periods represent reasonable means of limiting dead-hand control and are backed by the Uniform Law Commission or the American Law Institute, the two premier deliberative bodies devoted to impartial law reform based on the public interest.<sup>102</sup> The settlor should be allowed to select the period that best fits the needs of the trust.<sup>103</sup>

One question remains: Would the second prong of the proposal, the prong regarding existing trusts, be constitutional? For perpetual trusts that were established before the effective date and therefore have already qualified for the GST exemption, it might be unconstitutional to deny the exemption retroactively<sup>104</sup> or to terminate

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against perpetuities to a State that has repealed the rule against perpetuities, its inclusion ratio thereafter will be changed to one.

<sup>100</sup> Realistically, state law would likely be enacted or amended fairly quickly to satisfy the requirements.

<sup>101</sup> The settlor could not select the last of the three to expire (or second to last to expire), but could select the earliest to expire of two or three of the alternative periods or some period that expires earlier.

<sup>102</sup> The mission statement of each organization appears on their websites at <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> and <http://www.ali.org/index.cfm?fuseaction=about.overview>.

<sup>103</sup> The trust described in Illustration 1, *supra* Part V, would qualify for the GST exemption. Assuming that the trusts in Illustrations 2 and 3 were modified as provided in the *ALI's Property Restatement Third*, those trusts would also qualify for the GST exemption.

<sup>104</sup> The constitutional question is whether retroactive tax legislation violates the due process clause of the U.S. Constitution. *See* U.S. CONST. amend. V (“Nor [shall any person] be deprived of . . . property, without due process of law”). (The constitutional prohibition of ex post facto laws is irrelevant, because it applies only to criminal matters.)

The controlling due process decision on retroactive tax legislation is *United States v. Carlton*, 512 U.S. 26 (1994). In *Carlton*, the Supreme Court upheld the constitutionality of retroactive estate tax legislation to correct a congressional mistake. In the key passage, the Court said: “The due process standard is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.” *Id.* at 30-31. The Court also noted that Congress acted promptly after discovering the mistake and therefore established only a modest period of retroactivity and that much immediate tax revenue was going to be lost if the mistake was not corrected retroactively. Neither of those features—prompt action nor immediate loss of substantial tax revenue—is present in the case

the exemption on enactment.<sup>105</sup> But it would almost certainly be constitutional to grant a post-enactment grace period, say of six months or perhaps a year,<sup>106</sup> during which the terms of the trust could be modified to require the trust to terminate within one of the three perpetuity periods.<sup>107</sup>

Although modification could be achieved judicially under existing case law<sup>108</sup> or under statutory law that is already enacted or, if necessary, could be promptly enacted, it would be far more likely that modification would be achieved non-judicially by the exercise of trustee “decanting powers.”

Trust “decanting” allows the trustee—without judicial oversight—to modify the terms of the original trust by creating a new trust with different terms.<sup>109</sup> Technically, any new trust created during the grace period by the exercise of a “decanting power” might be regarded as a post-effective-date trust, allowing aggressive estate planners to argue that the new trust could remain GST-exempt for one of the three perpetuity periods *running from the decanting date*. Hopefully, the Treasury Department would see this ploy for the ruse that it is, and issue regulations that provide that the GST-exempt

at hand, but it is unclear whether either one is a requirement. Justice Sandra Day O’Connor, concurring in the result, did say, however, that in her view, “a period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise . . . serious constitutional questions.” *Id.* at 38.

<sup>105</sup> It might be constitutional to terminate the GST exemption upon enactment (*id.*), but that approach seems to be harsh when a less intrusive approach—the grace period approach advocated by the proposed solution—is more consistent with the original purpose of the GST exemption, which was to allow trusts whose initial value does not exceed the exemption ceiling to be exempt from GST tax for the time allowed by state perpetuity law.

<sup>106</sup> See Waggoner, *supra* note 95, at 1271

<sup>107</sup> See *supra* note 96. Requiring existing trusts to be modified to satisfy new tax requirements is not unprecedented. See I.R.C. §§ 2055(e) and 2522(c).

<sup>108</sup> To facilitate modification under state law, Congress should add a provision similar to I.R.C. § 2055(e) or § 2522(c) for modification of split-interest charitable trusts. For state law authority to modify trusts in the light of changes in tax law, see *supra* note 96. See also Zeydel & Blattmachr, *supra* note 65. The *ALI’s Property Restatement Third’s* perpetuity rule also calls for modification, providing: “Upon the petition of an interested person, the court shall modify a disposition that [might extend beyond the perpetuity limit]. . . . The form of the modification must be in a manner that most closely approximates the transferor’s manifested plan of distribution and is within the perpetuity limit.” See ALI’S PROPERTY RESTATEMENT THIRD, *supra* note 36, § 27.2 (2011).

<sup>109</sup> See *supra* note 60. A trustee “decanting power” is a fiduciary power of appointment. If a perpetual trust is a discretionary trust, as most perpetual trusts are, the trustee has a decanting power, which would enable the trustee to create a new trust with a termination date within one of the three perpetuity periods. See, e.g., UNIF. TRUST DECANTING ACT (now in draft form), <http://www.uniformlaws.org/Committee.aspx?title=Trust%20Decanting>.

period runs from the creation date of the original trust.

Any trust properly modified during the grace period would retain its GST exemption.<sup>110</sup> A trust not properly modified during the grace period would lose its GST exemption on expiration of the grace period.<sup>111</sup> The GST tax would then apply to any post-grace-period generation skipping transfer, whether it is a taxable termination, a taxable distribution, or a direct skip.<sup>112</sup>

Because the solution proposed here would truly end the perpetual-trust movement and its associated perpetual GST exemption for both new and existing trusts, it is consistent with the original intent of Congress in enacting the GST exemption.<sup>113</sup>

### CONCLUSION

By enacting the GST exemption with no durational limit, Congress unwittingly set in motion the perpetual-trust movement. Although tax revenues are lost by Congress's action and continued inaction, Congress has failed—so far—to remedy its blunder. A plausible explanation for its persistent indifference to the problem is that the revenue that would be collected by reversing its action would be a long way off.<sup>114</sup>

<sup>110</sup> Once a trust qualifies for the exemption, it should be subject to disqualification by any attempt to lengthen the term of the trust beyond the perpetuities period, through the use of a “decanting power” or otherwise. *See supra* text accompanying note 109; *cf.* Treas. Reg. § 26.2601-1(b)(1)(v).

<sup>111</sup> If a perpetual trust were not modified during the grace period, the GST exemption could be restored by modifying the trust later, but the restoration would be effective only upon modification.

<sup>112</sup> These three types of generation-skipping transfers are defined *supra* note 26.

<sup>113</sup> As expected, pro-perpetual-trust lawyers have come forward to argue that Congress should not adopt my proposal, stating: “In our view, discouraging perpetual trusts is simply not an appropriate use of federal tax law, regardless of the arguments one can legitimately make about their evils. . . . The tax benefits of the GST exemption should not be used to try to force taxpayers to create trusts with a federally mandated termination date or to modify existing [perpetual] trusts to shorten their duration.” *See* Dennis I. Belcher, Carol A. Harrington, Ellen K. Harrison, Amy E. Heller, Beth Shapiro Kaufman, Julie K. Kwon, Carlyn S. McCaffrey, & Pam H. Schneider, *Federal Tax Rules Should Not Be Used to Limit Trust Duration*, 136 TAX NOTES 832 (Aug. 13, 2012). For responses to their argument, *see* Calvin H. Johnson, *Perpetual Trusts: The Walking Dead*, 136 TAX NOTES 1215 (Sept. 3, 2012), and Lawrence W. Waggoner, *Congress Should Effectively Curb the GST Exemption for Perpetual Trusts*, 136 TAX NOTES 1216 (Sept. 3, 2012), available at <http://ssrn.com/abstract=2147989>.

<sup>114</sup> McCaffery offers a more cynical yet plausible explanation: “The rich setting up dynasty trusts are willing to pay their advisers for the privilege of avoiding transfer taxes forever. Those advisers and financial intermediaries, in turn, are willing to pay Congress to keep the fear of a death tax—and hence their lucrative business model—alive (forever).”

Although the solution proposed here would not raise much present or future *GST* tax revenue (nor would the Treasury proposal<sup>115</sup>), raising present or future *GST* tax revenue was not the purpose of the *GST* exemption. The purpose was to exempt trusts whose initial value does not exceed the exemption ceiling from the *GST* tax for the time allowed by state perpetuity law, but no longer. On this score, the solution proposed here is more aligned with the original purpose of the *GST* exemption than the Treasury proposal. If Congress were to enact that proposal rather than the Treasury proposal, existing and future trusts would terminate within the time allowed by state perpetuity law. When the trusts terminate, the trust principal would be distributed to the then-entitled beneficiaries, who would then own their shares outright and free of trust. Transfer tax revenue would thereafter arise from their future taxable transfers. That's exactly what Congress contemplated when it adopted the *GST* exemption.

Regrettably, the prospect that Congress will ever address the problem, much less address it effectively, grows dimmer with each passing year and each missed opportunity.<sup>116</sup>

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Congress is happy to cash the checks. . . . [I]t is easy to predict what will happen: not much." McCaffery, *supra* note 32, at 26. The Treasury proposal, *supra* Part VI.C, is arguably in the "not much" category. See also MARK LEIBOVICH, THIS TOWN 161 (2013) ("Corporations have figured out that despite the exorbitant costs of hiring lobbyists, the ability to shape or tweak or kill even the tiniest legislative loophole can be worth tens of millions of dollars.").

<sup>115</sup> The Joint Committee on Taxation estimated the revenue effects of the Treasury proposal through 2023 to be "negligible." JCT, *Estimated Budget Effects of the Revenue Provisions Contained in the President's Fiscal Year 2014 Budget Proposal*, JCX-11-13, at 8 (May 10, 2013).

<sup>116</sup> The Senate Finance Committee's draft of the Tax Technical Corrections Act of 2014 does not address the issue. See <http://www.finance.senate.gov/imo/media/doc/Chairman%27s%20Mark%20-%20Technical%20Corrections.pdf>.