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Articles

PERPETUITIES IN AN UNEQUAL AGE

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ABSTRACT—For centuries, the common law limited aristocratic wealth. In the last three decades, that has changed. One by one, state legislatures have eliminated the rule against perpetuities (the Rule), and now "dynasty trusts" can make carefully controlled payments to a settlor's descendants for hundreds of years. This change occurred soon before a large and ongoing intergenerational wealth transfer in the United States. Trusts scholars have roundly criticized the Rule's removal, and some have described it as charting a path to a new Gilded Age.

This Article draws a theoretical lesson from the Rule's demise. I argue that part of the reason for the Rule's end was the complexity of its function, operation, and rationale: most lawyers, and most citizens, don't really know what the Rule is, or how it operates. Thus, in spite of its value, the Rule found too few defenders when advocates from financial industries competing jurisdictionally for trust fees came to remove it. Complexity in inheritance law has this specific and timely cost: it can enable mechanisms for dynastic wealth defense—even when it is meant to do the opposite. This is because rule complexity causes asymmetric information among future players. This dynamic should figure into proposals for future reform.

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INTRODUCTION

It is a time of great public interest in inherited wealth.[1] Newspapers and magazines devote in-depth treatment to the topic.[2] For example, according to the *Wall Street Journal*, "[t]he greatest wealth transfer in modern history has begun."[3] The *Economist* estimates that "[i]nheritance flows are set to speed up . . . [and] double by 2036-40."[4] *Bloomberg* warns that "[t]ax-free inheritances fuel America's new $73 trillion Gilded Age."[5] The *New York Times Magazine* describes a "flood of princelings—and some potentially

1 *See* Lily L. Batchelder, *What Should Society Expect from Heirs? The Case for a Comprehensive Inheritance Tax*, 63 TAX L. REV. 1, 2 (2009) ("[W]ealth transfers are expected to explode as the baby boom generation passes away, totaling between $40 and $135 trillion over the next fifty-five years.").

2 *See, e.g.*, Mark Hall, *The Greatest Wealth Transfer in History: What's Happening and What Are the Implications*, FORBES (Nov. 11, 2019), https://www.forbes.com/sites/markhall/2019/11/11/the-greatest-wealth-transfer-in-history-whats-happening-and-what-are-the-implications/?sh=45a36aeb4090 [https://perma.cc/Z6NW-JPPD] ("Baby Boomers . . . are expected to transfer $30 trillion in wealth to younger generations over the next many years.").

3 Ben Eisen & Anne Tergesen, *Older Americans Stockpiled a Record $35 Trillion. The Time Has Come to Give It Away*, WALL ST. J. (July 2, 2021, 10:00 AM), https://www.wsj.com/articles/older-americans-35-trillion-wealth-giving-away-heirs-philanthropy-11625234216 [https://perma.cc/8FSC-QTHE].

4 *Wall Street Will Soon Have to Take Millennial Investors Seriously*, ECONOMIST (Oct. 20, 2020), https://www.economist.com/finance-and-economics/2020/10/20/wall-street-will-soon-have-to-take-millennial-investors-seriously [https://perma.cc/M4MN-78DD].

5 Ben Steverman, *Tax-Free Inheritances Fuel America's New $73 Trillion Gilded Age*, BLOOMBERG (Feb. 2, 2022, 8:00 AM), https://www.bloomberg.com/news/articles/2022-02-02/what-the-73-trillion-great-wealth-transfer-means-for-america-s-super-rich#xj4y7vzkg [https://perma.cc/X4FM-72H7].

worrisome consequences for social mobility in the United States."[6] Per the *New York Post*, the "greatest wealth transfer in human history is coming."[7]

Yet much of inheritance law idles at the corners of lawyers' minds. Scholars of trusts and estates, the body of private law that has regulated inheritances for centuries, have described their discipline as "a field that is supposedly as moribund as law ever gets."[8] Once central to legal education, trusts and estates has experienced some decline in the last century in the law school curriculum[9] and among lawyers who practice in large cities.[10] One might be tempted to think of trusts and estates as a quiet arena, built for days gone by when great fortunes were tied up in land and ancestral castles rather than financial assets, slow to change and increasingly irrelevant to the times.

This would not be true. In a period when large fortunes pass between generations at an increasing rate, trusts and estates law has changed substantially.[11] The powers of trustees, the protections trusts receive from their beneficiaries' creditors, and prudent investment requirements have all undergone discreet but powerful transformations in the last three decades.[12] Most strikingly—and in the face of widespread criticism from trusts and estates professors[13]—states have abolished the rule against perpetuities (the Rule) in significant numbers.[14] This Rule, notoriously complicated to apply in its traditional form, sets limits on trust dispensations to remote generations of a settlor's descendants. Aiming to prevent the "dead hand control" of

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[6] Annie Lowrey, *What Comes After Rich Baby Boomers? Kids with a Big Inheritance*, N.Y. TIMES MAG. (Mar. 11, 2014), https://www.nytimes.com/2014/03/16/magazine/baby-boomers-inheritance.html [https://perma.cc/A6YL-32DY].

[7] John Aidan Byrne, *The Greatest Wealth Transfer in Human History Is Coming*, N.Y. POST (June 22, 2014), https://nypost.com/2014/06/22/top-1-percent-spreading-nearly-60t-in-assets-to-heirs-charities/ [https://perma.cc/2ZLN-NRCU].

[8] Mark L. Ascher, *But I Thought the Earth Belonged to the Living*, 89 TEX. L. REV. 1149, 1150 (2011) (though arguing that this view is mistaken, and that "something significant is, indeed, afoot"). This differs from half a century ago, when trusts scholars would claim that "[t]here is no part of the law of greater interest to the people of America and England, from the standpoint of numbers, than estate planning." William D. Rollison, *The History of Estate Planning*, 37 NOTRE DAME LAW. 160, 160 (1961).

[9] *See* Dean Gregory Mark, *The Perspective of Time: Some Observations on the Relationship of Legal Education and Practice in the Past Century*, 38 OHIO N.U. L. REV. 911, 915 (2012).

[10] *See, e.g.*, John P. Heinz, Robert L. Nelson, Edward O. Laumann & Ethan Michelson, *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 LAW & SOC'Y REV. 751, 767 n.23 (1998) (noting the decline in trusts and estates practice in Chicago).

[11] *See* Max M. Schanzenbach & Robert H. Sitkoff, *The Prudent Investor Rule and Trust Asset Allocation: An Empirical Analysis*, 35 ACTEC J. 314, 314 (2010) (noting that "[a] quiet revolution in American trust law is upon us").

[12] *Id.* at 314–16, 319.

[13] *See infra* notes 108–112.

[14] *See infra* note 85 and accompanying text.

wealth,[15] the Rule seeks to ensure that dynastic fortunes cannot be encircled—protected from taxes, creditors, and the spending habits of profligate future generations—for more than a century at most.[16]

Described by a leading mid-century trusts professor as "the last phase of a centuries-long battle fought by the English courts against the dynastic impulses of the nobility and landed gentry,"[17] the rule against perpetuities existed in almost every state since the Founding Era. But beginning in the late 1980s, state legislatures responded to new federal tax incentives by removing the Rule.[18] Now, in many states, trusts can last forever in theory and for hundreds of years in practice.[19] A recent trusts scholar described the result as "nothing less than a prescription for a return to Europe's Belle Époque or America's Gilded Age, the era in the late nineteenth and early twentieth centuries defined by large pools of inherited wealth."[20]

In this concern, estates scholars are part of a growing chorus. Its theme is that expanding wealth inequality—and associated trends in legal doctrines

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15 *See, e.g.*, 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, 44 (1977) (describing the *Duke of Norfolk's Case*, which served as the basis for the elements and policy goals of the rule against perpetuities).

16 *See infra* notes 44–45 and accompanying text.

17 W. Barton Leach, *The Rule Against Perpetuities and Gifts to Classes*, 51 HARV. L. REV. 1329, 1330 (1938).

18 Grayson M. P. McCouch, *Who Killed the Rule Against Perpetuities?*, 40 PEPP. L. REV. 1291, 1294–99 (2013) (concerning the tax incentives for perpetuities in the 1980s).

19 Eric Kades, *Of Piketty and Perpetuities: Dynastic Wealth in the Twenty-First Century (and Beyond)*, 60 B.C. L. REV. 145, 147–48 (2019).

20 *Id.* at 145, 149.

spanning antitrust,[21] labor,[22] elections,[23] tax,[24] and corporations[25]—has brought about a newly unequal age.[26] But within that chorus, estates scholars are emphasizing different notes. Others who describe the arrival of a new Gilded Age are not interested in estates in the first instance. Other aspects of American law, including the aforementioned legal categories, are their immediate concern.

Whether or not the new dynasty trusts enable the establishment of a pre-First World War European-style aristocracy,[27] they are of special concern to civic life. The end of the rule against perpetuities was the end of a three-centuries-old settlement between different public policies, including liberty, equality, and encouragement to personal industry.[28] In the dynasty trust's

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21 *See, e.g.*, TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 14, 16 (2018) (describing the "impact of allowing unrestricted growth of concentrated private power, and abandoning most curbs in anticompetitive conduct" as leading to "inequality and material suffering"); Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. 766, 771 (2019) ("Persisting with the current antitrust paradigm would only uphold an unjust and increasingly unpopular status quo."); K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1688–89 (2018) (noting how a particular approach to antitrust enforcement would cut across "different social movements and advocacy constituencies implicating racial justice, consumer welfare, labor, business, and other interests along a common set of concerns about concentrated private power"); Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1, 26 (2015) ("A competition policy interest in inequality obviously would not arise in a political vacuum. It would more likely emerge as part of a broader concern with inequality, middle-class economic stagnation, and the political and economic power of large firms.").

22 *See, e.g.*, Ruth Milkman, *Back to the Future? U.S. Labour in a New Gilded Age*, 51 BRIT. J. INDUS. RELS. 645, 647 (2013) (describing how union activities have fallen "alongside the surge in income and wealth inequality"); Benjamin I. Sachs, *Law, Organizing, and Status Quo Vulnerability*, 96 TEX. L. REV. 351, 352 (2017) (describing interests in how the union movement might be reinvigorated).

23 *See, e.g.*, Tamara R. Piety, *Why Personhood Matters*, 30 CONST. COMMENT. 361, 388–89 (2015) (arguing that "[t]he most successful business entities have a powerful impact on the political process"); Bertrall L. Ross II, *Addressing Inequality in the Age of* Citizens United, 93 N.Y.U. L. REV. 1120, 1122 (2018) (detailing a current rise in inequality and how democratic representatives might feel pressure to redistribute in times of inequality).

24 *See* Ajay K. Mehrotra, *Envisioning the Modern American Fiscal State: Progressive-Era Economists and the Intellectual Foundations of the U.S. Income Tax*, 52 UCLA L. REV. 1793, 1802 (2005).

25 *See, e.g.*, Kent Greenfield, *Reclaiming Corporate Law in a New Gilded Age*, 2 HARV. L. & POL'Y REV. 1, 2–3 (2008) (implicating a theory of corporate law that will assist in redistribution of wealth instead of deepening current wealth disparities).

26 *See, e.g.*, Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1791 (2020) (referring to an age of "structural inequality and economic power").

27 *See* Thomas Piketty & Gabriel Zucman, *Wealth and Inheritance in the Long Run*, *in* 2B HANDBOOK OF INCOME DISTRIBUTION 1303, 1325 fig.15.15 (Anthony Atkinson & François Bourguignon eds., 2015) (showing that in 2010 more relative wealth was held by the top 1% and 10% of Americans than at any point since the 1930s).

28 *See infra* notes 46–55.

victory, it was equality that lost, and equality of the most popular kind. The more concentrated inherited wealth a society has, the less equal its opportunities are.[29] And equality of opportunity is widely agreed to be an important goal. Yet at a time when the United States has some of the lowest intergenerational mobility of any wealthy country,[30] the wealth disparities of our moment[31] are being projected down the generations via dynasty trusts forbidden until recently by the common law of almost every state.[32] This happened unobtrusively, the result of independent federal and state legislative acts.[33] While scholars continue to debate ambiguities about the consequences of the change, none debate the shift in the law.[34] The dead hand has left the tomb.

This Article draws a theoretical lesson from the Rule's demise. Trusts scholars tend to agree that lobbying from local financial firms competing jurisdictionally for trust fees caused legislatures to remove the Rule.[35] And while estates professors almost universally agreed that the Rule served an important policy rationale, most lawyers, and certainly most citizens, understood little about how the Rule worked or what it was for.[36] This meant that the Rule found few defenders among the legislatures that removed it.

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29 Janet L. Yellen, Chair, Bd. of Governors of the Fed. Rsrv. Sys., Perspectives on Inequality and Opportunity from the Survey of Consumer Finances 45 (Oct. 17, 2014).

30 *See* Miles Corak, *Income Inequality, Equality of Opportunity, and Intergenerational Mobility*, 27 J. ECON. PERSPS. 79, 82 (2013) (ranking the United States eleventh in generational-earnings elasticity within a group of thirteen wealthy OECD countries).

31 *See, e.g.*, Jeesoo Nam, *Taxing Option Luck*, 11 U.C. IRVINE L. REV. 1067, 1076 (2021) ("The top .01% of income earners have an average income of $28 million while the bottom 50% have an average income of $16,200. The gains to income since 1980 have been almost entirely captured by the top half of income earners. There is something prima facie unsettling about such a disparity in market outcomes. Under what set of theoretical commitments and empirical propositions could such large divides in market outcomes be justified?").

32 Kades, *supra* note 19, at 147 (stating that while the rule against perpetuities has been historically blocked, over half of the states now permit the creation of dynasty trusts).

33 Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 359–60 (2005) (describing the state and federal actions which led to the abandonment of the rule against perpetuities by many states); McCouch, *supra* note 18, at 1291–92 (describing the changes leading to the prevalence of dynasty trusts today).

34 *See, e.g.*, Eric Kades, *A New Feudalism: Selfish Genes, Great Wealth, and the Rise of the Dynastic Family Trust (DFT)*, 55 CONN. L. REV. 19, 21–23 (2022); Felix B. Chang, *How Should Inheritance Law Remediate Inequality?*, 97 WASH. L. REV. 61, 70–71 (2022) (discussing the impact of the changes on family wealth).

35 Sitkoff & Schanzenbach, *supra* note 33, at 417; Kades, *supra* note 19, at 148.

36 *See* Joel C. Dobris, *The Death of the Rule Against Perpetuities, or the RAP Has No Friends—an Essay*, 35 REAL PROP., PROB. & TR. J. 601, 634 (2000) (arguing that the general public does not see the perpetuities issue because "[t]he harm is so esoteric that seeing it or caring about it is difficult. Perpetuities are a silent killer, if you will. In discussing this Article with laypeople, one finds little comprehension of why a Rule Against Perpetuities exists, or why this Article was written").

In particular, the Rule is complex in two respects. First, the Rule's traditional form, including its famous what-might-happen test, is difficult to apply, as it requires that one map an array of different and unintuitive possible futures. The Rule's more simplified forms that have been considered throughout the twentieth century, such as the wait-and-see period or the ninety-year uniform plan,[37] are simpler to apply, but they are complex in another respect. Like the traditional Rule, the externalities they seek to prevent are not intuitively obvious. How the Rule accomplishes its aims, which are generally understood as keeping property marketable, avoiding inefficient wealth allocations, and curtailing dynastic wealth, rests on a variety of factual assumptions about wealth concentration, investment, and diffusion that, while apparently commonly understood among trusts practitioners and scholars, remain murky for lay audiences.[38]

The decline of the rule against perpetuities reveals a particular cost to complexity in inheritance law. Complex inheritance rules are vulnerable to elimination over time. This is because complexity creates two kinds of information asymmetries.[39] The first is an asymmetry between members of the same generation. The advisors representing local trust fund industries and large fortunes had particular reasons to develop expertise about how complex rules work; the general public, which benefited collectively from the Rule's existence, had little reason to learn or remember the Rule's complicated history and purpose.[40] The second is a temporal asymmetry between legal officials living in different eras. The common law judges who crafted the rule against perpetuities also understood what the Rule was and its purpose. But the Rule's complexity made future officials, such as the federal and state legislators who precipitated the Rule's removal, less likely to develop the same understanding.[41]

This Article argues that the information asymmetries caused by the Rule's complexity made it vulnerable to a dynamic called the politics of wealth defense, characterized by fortune-holders drawing upon skilled and motivated professional advice to defend their fortunes against public policies that curtail dynastic wealth across generations. The more unequally wealth is distributed, the more salient the politics of wealth defense is. Scholars have noted in other contexts that complex rules can offer opportunities for

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[37] RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS ch. 27, intro. note (AM. L. INST. 2011).

[38] *See infra* Part I.

[39] *See infra* note 205 and accompanying text.

[40] *See infra* notes 205–207 and accompanying text.

[41] *See infra* notes 208–209 and accompanying text.

evasion.[42] The history of the rule against perpetuities reveals that, over time, complexity also renders inheritance rules vulnerable to elimination.

There are, of course, reasons for laws to be complex, and the information costs of complexity do not counsel that complexity be avoided in all circumstances. But the lessons of the demise of the rule against perpetuities offer a point in favor of a simpler rule that redeems the Rule's policy priorities. In particular, at the state level, replacing the Rule's traditional, complicated what-might-happen test with a fixed term of years during which trust interests could vest is probably less complex and thus preferable to state taxes on trust incomes. And similarly at the federal level, instituting a perpetuities period is probably preferable, on the complexity dimension, to instituting a federal tax on perpetuities. Yet the fact that such a simpler Rule has been an option for legislatures since the repeals began in the late 1980s, and yet has not driven widespread popular support,[43] suggests that obstacles remain in developing support for the Rule and its policy rationale.

Part I of the Article surveys the history of the rule against perpetuities and the debates between estates scholars about reforming it in the years prior to its removal. Part II describes how laws permitting dynasty trusts have imbued trusts law with a new kind of aristocratic morality. Part III introduces the concept of the politics of wealth defense, analyzes how complexity can render inheritance laws vulnerable to these politics, and draws lessons for future reform.

I. THE LIFE AND DEATH OF THE RULE AGAINST PERPETUITIES

Under the rule against perpetuities, in its most common formulation, "[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[44] A trust that is written to make payments to new beneficiaries who will be born about a century after the trust was initially settled must be invalidated, at least with respect to those remote interests. After the lifespan of some life in being—

[42] *See, e.g.*, David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860 (1999) ("The tax law is the paradigmatic system of rules. Over thirteen large black volumes filled with tax rules sit on my shelf. Yet over the last several years, the purely rule-oriented approach to the tax law has begun to be perceived as a failure. The reason is that taxpayers have been able to manipulate the rules endlessly to produce results clearly not intended by the drafters. Manipulation of this sort is inefficient, loses revenue, and demoralizes others.").

[43] *See infra* note 188 and accompanying text.

[44] JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201, at 191 (4th ed. 1942).

which could be an infant, to maximize the trust period[45]—at the time of the trust's creation, plus twenty-one more years, trust settlors can no longer control their wealth into perpetuity. Thus, the rule against perpetuities meant, functionally, that dead hand control of wealth was limited to about a century.

The Rule emerged in seventeenth-century England, beginning with the *Duke of Norfolk's Case*,[46] which clarified that there was a limit to the length of trusts "when any inconvenience appears."[47] As courts developed the notion of inconvenience, they came to see it as a rule against remote contingencies, or remote vesting.[48]

Legal historians have tended to offer two kinds of theories for why the Rule developed as it did. The first is that the Rule was the product of intrafamily dynamics: heirs to landed fortunes working out among themselves how long the wishes of their grandparents ought to constrain the family's choices about what to do with its wealth.[49] The second, later explanation is that the Rule emerged through interfamily dynamics: conflict between landed wealth and a new mercantile class.[50] On this second explanation, the problem with perpetual trusts was that they removed property from the stream of commerce, frustrating the merchants' aspirations.[51] "In a society that has been portrayed as changing from a feudal to a capitalist order, the creation of a new rule restricting a landowner's ability to tie up his lands would, not surprisingly, be perceived as proof of such a transition."[52] Restraints on alienation, which were the hallmark of perpetual trusts, limited the transition from feudalism to market economies,

[45] Several commentators throughout history denounced the choice of using infants from long-lived families as lives in being as a ploy to extend dead hand control beyond the spirit, if not the letter, of the Rule. *See* Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 CORNELL L. REV. 157, 159 (1988) ("The device is one that allows drafters of trusts and other property arrangements to tie up property for an abnormally long time; it accomplishes this purpose by using, as measuring lives, babies from long-lived families."); 6 W. BARTON LEACH, AMERICAN LAW OF PROPERTY § 24.16, at 52 (A. Casner ed., 1952) (a trust settlor could "tie up his property, regardless of lives and deaths in his family, for an unconscionable period—viz. twenty-one years after the deaths of a dozen or so healthy babies chosen from families noted for longevity, a term which, in the ordinary course of events, will add up to about a century.").

[46] (1682) 22 Eng. Rep. 931, 960; 3 Chan. Cas. 1, 49.

[47] RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS ch. 27, intro. note (AM. L. INST. 2011).

[48] *Id.*

[49] *See id.* (noting that the Rule evolved in a world of "landed aristocracy and gentry" and functioned to "impose limits [on dead hand control] which seemed reasonable in that world" (quoting A. W. BRIAN SIMPSON, LEADING CASES IN THE COMMON LAW 76 (1995))).

[50] *See* John S. Grimes, *Runnymede Revisited*, 6 VAL. U. L. REV. 135, 136 (1972).

[51] *Id*.

[52] Haskins, *supra* note 15, at 20.

and so had to be curtailed.[53] The rule against perpetuities was thus also, on the second view, an early step toward meritocracy. "Once the major restraints on alienation were removed, successful men would rise and the incompetent would fall, regardless of the efforts or the prominence of their ancestors."[54]

The second view of the Rule's development—the meritocratic view—later came under criticism as a matter of history, including in the *Restatement*.[55] Critics argued that the laws against which the Rule emerged were unclear at the time of the *Duke of Norfolk's Case*, and the development of the Rule in some respects increased, rather than limited, the dead hand control of wealth.[56] Even so, the policy reasons that produced the Rule in its first development need not be the same as the reasons that subsequently sustained it. Whatever the status of restraints on alienability in English law in the 1680s, they became disfavored in the American common law in the centuries since, and so the Rule came to operate to prevent restraints on alienation beyond about a century.[57]

In its classic formulation, the Rule asked courts to determine whether the trust was valid at the moment of its creation.[58] Thus, if there was a possibility that interests could vest outside of the Rule's perpetuities period, the trust—or at least some of its future interests—would be invalidated.[59]

53 *See* Lewis M. Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707, 708 (1955) ("Ever since it first emerged in the *Duke of Norfolk's Case*, [the rule against perpetuities] has been declared to be a rule in furtherance of the alienability of property.").

54 Haskins, *supra* note 15, at 20–21 (criticizing this view of the Rule).

55 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS ch. 27, intro. note (AM. L. INST. 2011).

56 Haskins, *supra* note 15, at 21 ("*The Duke of Norfolk's Case* was a clarification of ancient contradictory assumptions, decisions and uncertainties with respect to how long interests in landed property might last. Moreover, the decision was not simply the resolution of an arcane point of property law: the case marked the climax of a long struggle between the conveyancers who wanted more freedom for the landed classes to control their estates and the royal judges who stood firm against these efforts for centuries. The conveyancers and their clients, not the judges, were the ultimate victors.").

57 *See* Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1191, 1195, 1221–22, 1264 (1985); Richard E. Manning, *The Development of Restraints on Alienation Since Gray*, 48 HARV. L. REV. 373, 403–04 (1935).

58 *See* Lewis M. Simes, *Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine*, 52 MICH. L. REV. 179, 180 (1953) ("In applying [the rule against perpetuities], the validity of a future interest is, with one exception, determined by considering the facts as they exist at the time the period of the rule begins to run, this time commonly being the delivery of the deed or the death of the testator. The one exception arises when an appointment under a general power to appoint by will only, or under a special power, is involved. In those cases, though the period is counted from the creation of the power, the validity of the appointment is determined by a consideration of facts as they exist at the time when the power is exercised.").

59 *See* Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2471–72 (2006).

This became known as the "what-might-happen test."[60] As students who take trusts and estates learn to their chagrin, applying the what-might-happen test quickly becomes complicated. "In no part of the law," wrote Professor John Chipman Gray in the nineteenth century, "is the reasoning so mathematical in its character; none has so small a human element."[61]

The *Third Restatement of Property* would, in the next century, concede that "[t]he common-law Rule is difficult to master."[62] Future events that the law counted as technically possible but which were implausible—including, as collected by commentators, "improbable and bizarre occurrences such as childbearing octogenarians and toddlers, unborn widows, inexhaustible gravel pits, wars that never end, slothful executors, and explosive birthday presents"—would force judges to engage in the difficult task of counting logical possibilities in order to ensure no Rule violation.[63] And if judges had to engage in this task, then so by extension did trust settlors and their lawyers. By the twentieth century, reformers would arrive.

At mid-century, Professor W. Barton Leach argued that the Rule was not fulfilling the purposes of its design. Leach wrote that he could "not recall a single twentieth-century case, English or American," in which a trust invalidated by the rule against perpetuities could not have been rewritten in such a way as to carry out the settlor's desires without violating the Rule.[64] Thus, "our courts in applying the Rule are not protecting the public welfare against the predatory rich but are imposing forfeitures upon some beneficiaries and awarding windfalls to others because some member of the legal profession has been inept."[65] Still, because the Rule served a useful purpose, this was "a job for the repair shop, not the scrap yard."[66] These early changes to the Rule aimed to preserve its core: limitation on dead hand control of wealth.

One of Leach's repairs, the wait-and-see doctrine, became popular.[67] Under this doctrine, rather than invalidating a trust whose terms could in theory violate the rule—if something happened later, such as a beneficiary's

[60] *See* Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. REV. 1023, 1024 (1987).

[61] GRAY, *supra* note 44, ix.

[62] RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS ch. 27, intro. note (AM. L. INST. 2011).

[63] Schanzenbach & Sitkoff, *supra* note 59, at 2472.

[64] W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 723 (1952).

[65] *Id.*

[66] *Id.* at 748.

[67] *Id.* at 730; Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2099 (2003).

unexpected remarriage—courts would "wait and see" if the event occurred in practice.[68] If no event occurred to cause the Rule's violation, then the trust would vest with its beneficiaries. If a violation-causing event did occur—the beneficiary unexpectedly remarried—then courts would end the trust, disbursing the funds to the last beneficiaries whose rights had vested within the proper period.

Supporters highlighted advantages that the wait-and-see doctrine enjoyed over the what-might-happen test.[69] Chiefly, they argued that

> the common law Rule is so filled with unexpected distinctions and technicalities that only specialists, employed by the rich, can know them. The average person, hiring the average lawyer . . . is the usual victim of the Rule, whereas the very rich, with all their wealth and expert legal advice, go unscathed.[70]

For its proponents, the wait-and-see approach was thus a kind of "consumer-protection legislation," saving the interests of people who could not access elite legal services.[71]

Wait-and-see was not without problems, however. In particular, it raised a question of how long the wait-and-see period should last.[72] This was a technical question about which lives in being counted as "measuring lives."[73] Under the common law Rule, this did not pose a problem because "a common law measuring life is a person for whom there is *no* chain of events that *might possibly* arise" that could violate the Rule.[74] The common law Rule contained "no mechanism for marking off a 'perpetuity period' in

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[68] More precisely, Professor Lawrence Waggoner described the wait-and-see approach in the following way:

> Wait-and-see is a two-step strategy. Step One preserves the validating side of the common-law Rule Against Perpetuities (the common-law Rule): By satisfying the common-law Rule, a nonvested future interest in property is valid at the moment of its creation. Step Two is a salvage strategy for future interests that would have been invalid at common law: Rather than invalidating such interests at creation, wait-and-see allows a period of time, called the waiting period, for the contingencies to work out harmlessly.

Waggoner, *supra* note 45, at 157.

[69] *See, e.g.*, Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1649 (1985) (describing how supporters of the wait-and-see doctrine argued that it was more easily comprehensible and therefore more equitable than the what-might-happen test).

[70] *Id.*

[71] *Id.*

[72] *Id.* at 1656.

[73] *Id.* at 1648 ("The most important question under [the wait-and-see doctrine] is: *During what lives do we wait and see*?"); *see also* Lawrence W. Waggoner, *Perpetuities: A Perspective on Wait-and-See*, 85 COLUM. L. REV. 1714, 1715–16 (1985) ("[T]he common law Rule does not, in my view, identify the lives to be used in measuring off the wait-and-see perpetuity period.").

[74] Waggoner, *supra* note 73, at 1715.

each given case."[75] But determining how long the wait-and-see period should last would require looking at actual, real lives in being, which, to be workable, required that courts look at some limited set of possible people. Identifying this limited set of actual lives in existence posed complicated questions about whose lives were "causally connected" to the trust in the appropriate way.[76]

To avoid these questions, another reform was proposed: judges would wait precisely ninety years before invalidating a trust as violating the Rule.[77] Instead of dealing with the problems of "identification and tracing" inherent in measuring lives, ninety years would "fix a period of time that approximates the average period of time that would traditionally be allowed by the wait-and-see doctrine."[78] This reform had several attractive aspects for practitioners. A bright-line rule of ninety years would protect all interests held in trust; only after ninety years would courts apply the common law Rule to determine whether contingent interests now existed that would break it. The ninety-year period would, for its proponents, make things considerably easier for courts because, like other bright-line rules, the ninety-year period was efficient and predictable: "[L]itigation free, easy to determine, and unmistakable."[79] The plan earned the endorsement of the Uniform Law Commissioners, becoming part of the Uniform Statutory Rule Against Perpetuities in 1986.[80]

Partisans of the unrevised wait-and-see doctrine were unconvinced. They worried that the ninety-year plan would, in effect, replace the ancient rule against perpetuities with a bright-line, "no interest is good unless it vests within ninety years" rule. It was, according to one advocate, "an extraordinary thing to declare a whole body of prohibitory law to be in abeyance for 90 years, with no violation of the law possible for that period of time."[81] Since ninety years was enough to cover most lives in being plus

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75 *Id.*

76 Dukeminier, *supra* note 69, at 1648 ("To solve a perpetuities problem under the common law Rule, you assemble all persons who can affect vesting (or, to use the more common phrase, all persons causally connected to vesting). You test each of these persons to see if you can find one who permits you to prove validity of the gift. If you do not find a validating life among this group, because of something that might happen in the future, the wait-and-see doctrine tells you to wait out these lives and see what actually happens. If the gift actually vests within twenty-one years after these causally-related persons are dead, the gift is valid. Hence the measuring lives for wait-and-see are the lives causally related to vesting.").

77 *See* Waggoner, *supra* note 45, at 157–58.

78 *Id.* at 162.

79 *Id.* at 164.

80 *Id.* at 157–58. It was also endorsed by the House of Delegates of the American Bar Association, the Board of Regents of the American College of Probate Counsel, and the Board of Governors of the American College of Real Estate Lawyers. *Id.* at 158–59.

81 Dukeminier, *supra* note 60, at 1025.

twenty-one years, the rule against perpetuities would be rendered irrelevant at the end of the ninety-year period in many cases. As a result, fewer lawyers would learn about the rule against perpetuities, which would probably hasten its complete replacement with the ninety-year plan.[82] At the end of ninety years, "[s]urely the bar will rise (almost in unison, with only the dissent of some antiquarians) and formally abolish the Rule."[83]

The debate continued in this way. None of its participants, divided as they were, repudiated the Rule's rationale. Everyone agreed that allowing wealth to be controlled for too long by prior generations would be a mistake.[84] Instead, each of the various reforms proposed was meant to vindicate the Rule's purpose while making it easier to apply in practice. And the conversation would have carried on, maybe reaching a resolution, had legislatures not ended it.

Beginning in the 1990s, state legislatures abolished the rule against perpetuities wholesale, replacing it with neither the wait-and-see approach nor the ninety-year plan.[85] They did not heed the reformers' ideas,[86] as their goals were not to preserve the Rule's purpose, but to remove it.[87] The reason was a change to the federal tax code in 1986, which created an exemption

[82] *Id.* at 1026–27.

[83] *Id.* at 1027.

[84] *See, e.g.*, Waggoner, *supra* note 73, at 1714 ("Professor Dukeminier and I agree on most of the important points concerning perpetuity law and perpetuity reform. We agree that the Rule Against Perpetuities still serves a socially useful function of limiting dead hand control, and should not be abolished.").

[85] This was the case even in five states whose constitutions purported to ban perpetuities. *See* Steven J. Horowitz & Robert H. Sitkoff, *Unconstitutional Perpetual Trusts*, 67 VAND. L. REV. 1769, 1772 (2014).

[86] Professor Stewart Sterk argues that the ninety-year plan contributed to the Rule's abolition:

> The Uniform Statutory Rule Against Perpetuities (USRAP)—designed as a reform of the common law Rule rather than an abolition of perpetuities restrictions—contributed in some measure to the movement toward abolition . . . . By explicitly permitting any trust to endure for at least ninety years, the drafters of USRAP signaled that ninety-year trusts would do no significant harm to the social fabric. And if ninety years is unobjectionable, why not 150, or 200?

Sterk, *supra* note 67, at 2104. In some respects, this is not a simple question. The traditional rule against perpetuities was known to permit lucky trusts to last for about ninety years—the actuarial prediction for the length of a child born just before the trust's creation, plus twenty-one years—and so more should be said, it seems, for why formalizing this figure into ninety years would contribute to the idea that doubling—to 200 years—the traditional perpetuities period would be unobjectionable. But the idea has many adherents. *See, e.g.*, Dukeminier, *supra* note 60, at 1055 ("[U]sing the common law perpetuities period for wait-and-see does not offer an alternative perpetuities period, as does 90 years, which invites an increase in long-term trusts.").

[87] *See, e.g.*, Christopher M. Reimer, *The Undiscovered Country: Wyoming's Emergence as a Leading Trust Situs Jurisdiction*, 11 WYO. L. REV. 165, 199 (2011) (attributing Wyoming's success in attracting trust funds to the fact that it allows "[n]ear perpetual trusts capable of avoiding transfer taxes for up to 1000 years").

that allowed people to transfer $1 million during life, or $1.5 million at death, free from federal wealth transfer taxes.[88] The exemption has increased periodically since 1980; it is now about $12 million.[89] The only limitation on the length of a trust containing the exempt amount to make payments into the future lies in a state's limitations on perpetual trusts. The result was to prompt states to abolish the rule against perpetuities in order to attract trust funds and their associated fees.[90]

To defeat the Rule and its rationale, no new arguments were advanced. "The policy issues associated with allowing perpetual or near-perpetual trusts," as the *Third Restatement of Property* concluded, "have not been seriously discussed in the state legislatures."[91] Instead, in Professor Stewart Sterk's description, "[b]ecause Congress had reduced the opportunity to avoid estate taxation, and simultaneously created an exemption from the new tax, pressure inevitably arose to make the exemption as valuable as possible."[92] At the same time, unrelated expansions of civil liability at the state level for legal malpractice made lawyers newly wary of how the Rule could cause unforeseen problems with trusts.[93] Trusts, banks, and related business entities lobbied for the Rule's complete removal;[94] they were successful in at least twenty-one states;[95] and, as a result, funds poured into the new perpetual trusts—at least $100 billion as of twenty years ago.[96]

As told so far, this story remains somewhat mysterious. Why would states, most of which do not tax trusts, abolish the Rule, given there are no direct revenue benefits to being the nominal location of trust assets?[97] And

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[88] Sitkoff & Schanzenbach, *supra* note 33, at 359. "Federal wealth transfer taxes comprise estate, gift, and generation-skipping transfer (GST) taxes." *Id.* at 359 n.2.

[89] Felix B. Chang, *How Should Inheritance Law Remediate Inequality?*, 97 WASH. L. REV. 61, 71 (2022) (citing Julie Garber, *How the Federal Estate Tax Exemption Changed from 1997 to Today*, BALANCE (Jan. 20, 2022), https://www.thebalance.com/exemption-from-federal-estate-taxes-3505630 [https://perma.cc/VB7W-G3AS]).

[90] Schanzenbach & Sitkoff, *supra* note 59, at 2474–75, 2495.

[91] RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS ch. 27, intro. note (AM. L. INST. 2011).

[92] Sterk, *supra* note 66, at 2100.

[93] *Id.* at 2101.

[94] LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 131–32 (2009).

[95] *See* Schanzenbach & Sitkoff, *supra* note 59, at 2466.

[96] Sitkoff & Schanzenbach, *supra* note 33, at 359 ("In the timeframe of our data, seventeen states abolished the Rule, implying that through 2003 roughly $100 billion in trust assets have moved as a result of the Rule's abolition.").

[97] *Id.* at 363 ("Our findings not only contradict the simple, state-revenue-based model but also cast doubt on recent high-profile work that, by showing a lack of tax revenue from attracting new business, questions the existence of the phenomenon. . . . Even if attracting business does not directly increase the

because the form of the federal generation-skipping transfer tax provision as referenced here only came into being in 1986, states that wanted to entice dynasty trusts could have done so—albeit with fewer federal tax ramifications—before 1986, yet almost no jurisdiction had.[98]

One explanation, provided by Professor Robert Sitkoff, focuses on the mobility of modern wealth:

> In contrast to the days of old, in which the patrimony was typically ancestral land, wealth today generally takes the form of liquid financial assets, which are easily moved from one state to another. To ensure the desired choice of law, the settlor is usually advised not only to provide in the trust instrument what law is to govern, but also to give the chosen state a nexus by naming an in-state trustee and giving that trustee custody of the trust fund. Therein lies the political economy of the Rule's demise. Local bankers and trust lawyers have lobbied for its abolition.[99]

Most scholars to consider the question have concluded that it was jurisdictional competition for trust funds, as well as lobbying from the financial services industry, that ended the Rule.[100] Apart from these scholars

state's tax revenue, local interest groups nonetheless may benefit from, and hence lobby for, laws that will attract business to the state."); Robert H. Freilich, *Eliminating Perpetual Trusts Is a Critical Step Towards Alleviating America's Devastating Income Inequality*, 88 UMKC L. REV. 65, 68 (2019) ("Contrary to popular belief, the relocation of perpetual trusts to those states does not create any benefit to the recipient states, most of which have no inheritance taxes except for small annual registration fees . . . .").

98 Idaho, Wisconsin, and South Dakota were the only states to abolish the rule against perpetuities before 1986. Joshua C. Tate, *Perpetual Trusts and the Settlor's Intent*, 53 U. KAN. L. REV. 595, 603 (2005); *see also* Schanzenbach & Sitkoff, *supra* note 59, at 2495 ("[W]e conclude that the immediate stimulus for the modern perpetual trust phenomenon was the GST tax.").

99 Robert H. Sitkoff, *The Lurking Rule Against Accumulations of Income*, 100 NW. U. L. REV. 501, 508 (2006).

100 *See, e.g.*, FRIEDMAN, *supra* note 94, at 131–32 ("Basically, banks and trust companies lobbied for the change."); Ascher, *supra* note 8, at 1158 ("This, then, is a story *not* about a change in popular attitudes but about the financial-services industry's ability to manipulate state legislatures."); Kades, *supra* note 19, at 148 ("Specifically, bank trust departments employing clever lawyers and effective lobbyists convinced legislatures in state after state to erase the venerable RAP for no better reason than to aid them in competing for wealthy people's trust business."); Sitkoff & Schanzenbach, *supra* note 33, at 359 ("The driving force behind the erosion of the Rule was not a careful reconsideration of the ancient common law policy against perpetuities, but rather a 1986 reform to the federal tax code. Under [this reform], a transferor can pass . . . $1.5 million at death, free from federal wealth transfer taxes . . . for as long as state perpetuities law will allow the trust to endure. In a state that has abolished the Rule, successive generations can benefit from the trust fund, free from subsequent federal wealth transfer taxation, forever."); Sitkoff, *supra* note 99, at 501, 508 ("Accordingly, the race to abolish the Rule is a race to attract trust funds by opening a loophole in the federal wealth transfer taxes. In contrast to the days of old, in which the patrimony was typically ancestral land, wealth today generally takes the form of liquid financial assets, which are easily moved from one state to another. To ensure the desired choice of law, the settlor is usually advised not only to provide in the trust instrument what law is to govern, but also to

who had been engaged in discussions about the Rule's reform,[101] few seemed to notice. Law students had long considered the rule against perpetuities arcane.[102] Although estates scholars seemed to agree that federal wealth "transfer taxes [were] being avoided in a manner that Congress did not intend," it was not clear to non-estates specialists precisely what had happened.[103] Now the Rule has been gone from a substantial number of states for almost four decades.[104]

II. THE LAW'S NEW ARISTOCRATIC MORALS

What does a United States without the rule against perpetuities look like? Two arguments have emerged in the wake of the Rule's removal. On one side, some estates scholars have concluded that the inevitable result is a new aristocracy. On the other side, different estates scholars have argued that the Rule's demise will not have significant dynastic effects, because wealth will struggle to grow at pace with numbers of descendants. In this Part, following the theories of others, the Article will first sketch why, absent regulatory intervention, the new dynasty trusts are likely to cement generational wealth over longer periods. Second, the Article will draw out what this reveals about the function that the rule against perpetuities served. The Rule was a compromise between different public policy goals, including

give the chosen state a nexus by naming an instate trustee and giving that trustee custody of the trust fund. Therein lies the political economy of the Rule's demise. *Local bankers and trust lawyers have lobbied for its abolition*." (emphasis added)); McCouch, *supra* note 18, at 1306 ("Responsibility for the death of the rule lies at least as much with the bankers and lawyers who promote perpetual trusts as with the GST exemption that they have so assiduously exploited."). The jurisdictional competition dynamic among states regarding trusts and estates law has existed for at least a century. *See, e.g.*, Jeffrey A. Cooper, *Interstate Competition and State Death Taxes: A Modern Crisis in Historical Perspective*, 33 PEPP. L. REV. 835, 837–40 (2006) (describing jurisdictional competition among states' inheritance taxation policies in the early twentieth century).

101 *See, e.g.*, Verner F. Chaffin, *Georgia's Proposed Dynasty Trust: Giving the Dead Too Much Control*, 35 GA. L. REV. 1, 2, 15, 22 (2000) ("[T]he Rule Against Perpetuities attempts to strike a fair balance between the desires of the living and the rights of the deceased to control the enjoyment of property. The dynasty trust destroys this balance by allowing the present generation to do as it wishes with the property it owns, without regard for the wishes of succeeding generations, even those whom the settlor cannot know and see.").

102 *See, e.g.*, Maureen E. Markey, *Ariadne's Thread: Leading Students into and out of the Labyrinth of the Rule Against Perpetuities*, 54 CLEV. ST. L. REV. 337, 344 (2006) ("Thirty years ago, the California Supreme Court, in *Lucas*, decided that because the Rule is so arcane and complicated, it was not malpractice for an attorney to violate it. Never has a decision been so thoroughly ridiculed and criticized. Not surprising, because probably nowhere else has a court actually decided it was not malpractice for an attorney not to know the law! *Lucas* is simply unsupportable. It is widely believed that if the same issue was presented to the Court today, it would be decided differently and *Lucas* would be overruled. Students, however, love the case." (citing Lucas v. Hamm, 364 P.2d 685, 690 (Cal. 1961))).

103 Schanzenbach & Sitkoff, *supra* note 59, at 2496.

104 *See id.* at 2466–67.

liberty, equality, and encouragement to personal industry. Under a theory about intergenerational mobility popular among trusts and estates practitioners—the "shirtsleeves to shirtsleeves in three generations" theory—the Rule was a drag against multigenerational inequalities of opportunity.[105] This, in retrospect, was one of the Rule's functions, along with the two goals most commonly cited in the Rule's recent literature: keeping property marketable[106] and avoiding the inefficiency of dead hand control.[107] In removing the Rule, trusts law has quietly embraced a dynastic morality that it hadn't before.

A. The New Law of Intergenerational Wealth

Trusts and estates scholars have commonly argued that, by dissolving the Rule and preserving tax-exempt trusts into perpetuity, ever-more-remote generations will have access to inherited wealth. "In short," Professor Mark Ascher writes, "we Americans seem to be creating for ourselves a law of inheritance even more amenable to dynastic wealth than that of the English, against whose aristocratic traditions we once chafed."[108] "Failing to tax transfers of wealth at death," according to Professor Ray Madoff, "promotes and nurtures an aristocratic class—individuals with enormous amounts of wealth and power achieved not because of their talents or effort but solely because of the luck of their birth."[109] For Professor Eric Kades, "[b]ecause testators can create trusts ruled by the jurisdiction of their choosing, any wealthy American can now set up a multi-million dollar dynasty trust ensuring that forever her progeny and only her progeny shall enjoy the income generated by her bequeathed wealth."[110] Professor Felix Chang writes that "[f]reedom of testation entrenches the privileges and wealth distributions of the status quo. At its most extreme, the cold, dead hand of a decedent can steer the disposition of their assets in perpetuity, outside the reach of all creditors."[111] For Professor Allison Tait, "[t]he law of high-

[105] Lauren J. Wolven & G. Scott Clemons, *Transmitting Wisdom Along with Wealth*, SR003 ALI-ABA 551, 553 (2009) ("The first generation creates the wealth, the second generation (under the watchful eye of the first) preserves it, and the third knows no better and spends it. The fourth has to start all over again, from shirtsleeves to shirtsleeves.").

[106] Sitkoff & Schanzenbach, *supra* note 33, at 365.

[107] *See, e.g.*, *id.* ("The Rule is said to have two purposes: to keep property marketable and to limit 'dead hand' control"); A.W.B. SIMPSON, LEGAL THEORY AND LEGAL HISTORY 159–60 (1987) (suggesting that the rationale of English courts developing the rule against perpetuities was to prevent dead hand control "outside the range of reasonable foresight").

[108] Ascher, *supra* note 8, at 1172.

[109] RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 68 (2010).

[110] Kades, *supra* note 19, at 147.

[111] Chang, *supra* note 89, at 62.

wealth exceptionalism—dedicated to high-wealth family sovereignty and the preservation of family wealth—cannot and should not be the law that obliquely governs our larger state."[112]

Dynasty trusts perpetuate inherited wealth for several kinds of reasons. The first is that dynasty trusts can preserve capital more easily and for a longer duration than trusts subject to a rule against perpetuities. As the above scholars noted, dynasty trusts escape taxation, compound capital accumulation over longer periods, and constrain wealth in such a way as to prevent its being dispersed by members of later generations. Another kind of reason is that dynasty trusts can be written in such a way as to encourage the formation of human capital through the meritocratic training that generates highly remunerated labor. Thus, even if future economies become more dependent on super-skilled labor than capital, as some suggest is true of the current economy,[113] dynasty trusts, so long as they are written in the right way, can still provide advantages to the labor of future descendants born outside the traditional perpetuities period.[114]

First, dynasty trusts preserve capital within families over generations by escaping taxation.[115] In states without the rule against perpetuities, "successive generations can benefit from the trust fund, free from subsequent federal wealth transfer taxation, forever."[116] The current exemption of around $12 million[117] means that fortunes up to about 100 times the current median household net worth can pass tax-free into a dynasty trust.[118] Once transferred, so long as they are invested by a prudent trustee, the funds are likely to enjoy a compounding interest rate that is higher than growth in the overall American economy.[119] Finally, because of a doctrinal innovation

112 Allison Anna Tait, *The Law of High-Wealth Exceptionalism*, 71 ALA. L. REV. 981, 987 (2020).

113 *See* DANIEL MARKOVITS, THE MERITOCRACY TRAP 161–63 (2019).

114 *Cf.* Darren T. Case, *Blown Inheritance: Avoiding the Worst in the Great Wealth Transfer*, ARIZ. ATT'Y, July/Aug. 2016, at 38, 42 ("[W]hen clients become knowledgeable of the statistics involved, and are advised of the estate planning strategies available, the likelihood of success in preventing blown inheritances appears to improve.").

115 Chang, *supra* note 89, at 63 ("[F]ortifying the rule against perpetuities . . . frees up large estates for taxation and, more importantly, incentivizes settlors to divert assets to spending.").

116 Sitkoff & Schanzenbach, *supra* note 88, at 359.

117 *See, e.g.*, Chang, *supra* note 89, at 71 ("Today, with the Tax Cuts and Jobs Act of 2017, the exclusion has metastasized to $11.7 million while the top tax rate has wilted to 40% (applying to a top bracket of one million dollars).").

118 *See* Neil Bhutta et al., *Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances*, FED. RSRV. BULL., Sept. 2020, at 1, 10, https://www.federalreserve.gov/publications/files/scf20.pdf [https://perma.cc/9VKZ-C8SN] (stating that the median household net worth in 2019 was $121,700). Reaching $12 million requires multiplying this figure by 98.6.

119 *See* Kades, *supra* note 19, at 156, 160–62; Piketty and Zucman, *supra* note 27, at 1357. For a calculation of this growth, see Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*,

called the spendthrift trust, which renders the interests of a beneficiary inalienable,[120] the funds are protected from the improvident indulgences of future generations, as well as their creditors.[121] In sum, perpetual trusts thus offer capital-based advantages.

Dynasty trusts also might confer advantages to remote heirs in an economy whose rewards go primarily to certain kinds of skilled labor rather than capital. The increased shares of incomes going to highly remunerative professions, including law, finance, and medicine, have caused a renewed focus on schooling and training and how they might perpetuate wealth inequality.[122] Traditional bequests of large fortunes to the next generation might be thought to discourage their beneficiaries from participating in the training regimes required to sustain larger salaries over the course of their lifetimes.[123] Perpetual trusts, by contrast, can limit disbursements to certain kinds of expenditures, such as education,[124] guaranteeing access to economic training to descendants down the generations.[125] This would function as a series of stepladders to encourage the human capital of each remote heir.

Some perpetual-trust advertisements, as one survey found, seem to be alert to such ambitions:

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50 UCLA L. REV. 1303, 1318 (2003) ("If the trustee invests $1.1 million in common stocks, which appreciate in value at the same rate stocks have appreciated over the twentieth century, the original trust capital of $1.1 million will grow to over $200 million in one hundred years (or, adjusted for inflation, to $10 million).").

[120] This also means that the beneficiary's creditors cannot access it. *See* Note, *Liability of the Proceeds of a Spendthrift Trust for Tax Claims*, 44 YALE L.J. 1116, 1116–17 (1935) ("Despite the attacks of Gray and other legal scholars against the spendthrift trust device, a large majority of American jurisdictions enforce spendthrift provisions in trust indentures, and generally neither the corpus nor the income is available to creditors of the beneficiary."); John K. Eason, *Policy, Logic, and Persuasion in the Evolving Realm of Trust Asset Protection*, 27 CARDOZO L. REV. 2621, 2622 (2006); Richard C. Ausness, *The Offshore Asset Protection Trust: A Prudent Financial Planning Device or the Last Refuge of a Scoundrel?*, 45 DUQ. L. REV. 147, 150 (2007). *See generally* JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY (2d ed. 1895).

[121] *See, e.g.*, Ascher, *supra* note 8, at 1154 (stating that spendthrift trusts "effectively render the beneficiaries' interests off-limits to their creditors"). This is also sometimes known as "asset protection planning." *See* Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1036 (2000).

[122] *See* MARKOVITS, *supra* note 113, at 71–73.

[123] *See* Wolven & Clemons, *supra* note 105, at 554.

[124] *See, e.g.*, Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 18–19 (1992) ("A trust instrument thus could stipulate that the trustee make payments to the beneficiary only for certain expenses—say, medical care, or education, or housing—as opposed to providing the beneficiary with an unrestricted income stream."); Dukeminier & Krier, *supra* note 119, at 1334 ("Another way to create flexibility in a trust is by giving a trustee discretionary powers: for example, to distribute income and principal among the beneficiaries as the trustee sees fit . . . .").

[125] *See, e.g.*, MARKOVITS, *supra* note 113, at 125–33 (detailing the investments currently made in the education of children from wealthy families).

> Another common concern of wealthy individuals is that their descendants will, in the words of one website, become "lazy bums." Settlors want their descendants to have what they need, but they also want them to be productive and hardworking members of society, and they do not want their inheritance to provide disincentives in this regard. Articles and websites speak to this concern by emphasizing that distributions of trust funds can be made conditional on college graduation, income level, employment, or other indicators of success, and that the trust funds can be used to provide incentives for positive behavior or to promote family philosophies and values.[126]

Perpetual trusts offer clear advantages to the formation of family dynasties. But the further one proceeds in time, the more wrinkles emerge. A settlor who wants to protect their wealth from dissipation down the generations runs into at least three problems, as detailed by Professors William Turnier and Jeffrey Harrison[127]: inflation, trustee fees, and the fact that the number of one's descendants grows exponentially.[128] But none of these problems are insurmountable, at least not over a period of centuries, as closer examination shows.

The first two problems for the would-be dynast are inflation and fees. Inflation, Turnier and Harrison write, "has historically run at the rate of about 3% per year. Roughly speaking, that means that if one were to realize a net return of 8%, after accounting for trust costs, investment expenses and taxes, the real inflation adjusted return would be close to 5%."[129] Even so, 5%—

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[126] Tate, *supra* note 98, at 616–17.

[127] William J. Turnier & Jeffrey L. Harrison, *A Malthusian Analysis of the So-Called Dynasty Trust*, 28 VA. TAX REV. 779, 789 (2009).

[128] *Id.* at 792–804.

[129] *Id.* at 796.

which is perhaps a conservative assumption if wealth is well-invested[130]—would surpass the annual growth of the American economy.[131]

The third problem for the dynast is the fact that the number of their descendants is likely to grow exponentially. If each generation has two children, then two children will lead to four grandchildren, eight great-grandchildren, sixteen great-great-grandchildren, and so on. Turnier and Harrison write:

> Families, like national populations, increase geometrically, and unless resources in a dynasty trust grow at a rate sufficient to keep up with the expectations of the ever increasing living members of the beneficiary class who will look to the trust for support, the demand for distributions from the trust will eventually exceed the ability of the trust to satisfy that demand.[132]

Stated differently, eventually there will be too many beneficiaries and the trust will be forced to pay out all of its principal, and so end. Yet this problem, too, is not insurmountable. As Eric Kades has noted, well-invested wealth also grows exponentially.[133] On his calculation, if the average number of children per generation is two, then the number of trust beneficiaries will

[130] Good investments may run above 5% per year. The post-inflation average annual return for at least one U.S. equities index over the last two centuries has been estimated by some scholars at above 7 or 8%. *See* Òscar Jordà, Katharina Knoll, Dmitry Kuvshinov, Moritz Schularick & Alan M. Taylor, *The Rate of Return on Everything, 1870–2015*, 134 Q.J. ECON. 1225, 1282 tbl.X (2019); Josefin Meyer, Carmen M. Reinhart, & Christoph Trebesch, *Sovereign Bonds Since Waterloo*, 137 Q.J. ECON. 1615, 1670 tbl.VII (2022). Index investments also tend to require less than the 1–2% annual fees asked by active managers. *See* Turnier & Harrison, *supra* note 127, at 793 ("When all is said and done, absent an existing relationship with a financial institution where the presence of great wealth already under management is likely to result in significant discounting, one could expect that custodial fees, investment expenses, and other professional fees are likely to result in a total diminution of gross investment returns by something in the neighborhood of 1–2% of corpus, with the likely cost lying somewhere in between."); Kades, *supra* note 19, at 187–88 ("[I]nformed donors will know that money managers rarely beat market index funds. Management fees on simple index funds containing a portfolio with large numbers of stocks, bonds, and other assets are fractions of 1%."). Arguments that dynasty trusts naturally run out in timeframes approximating the rule against perpetuities seem to make much more conservative estimates of wealth growth. *See, e.g.*, Scott Andrew Shepard, *A Uniform Perpetuities Reform Act*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 89, 105 (2013) (assuming a real annual growth of 3%).

[131] *See* Piketty & Zucman, *supra* note 27, at 1357 fig.15.28. Some have also argued that larger investments tend to generate higher rates of return. *See, e.g.*, Kades, *supra* note 19, at 156 ("Although not conclusive, there is strong evidence that those investing larger sums earn higher returns. Given the lack of any systematic administrative or survey data, scholars perforce have examined eclectic evidence to shed light on the relationship between an investor's wealth and the rate of return on her investments. As a baseline, annual rates of return over the last few decades have averaged around 4%. The world's wealthiest individuals, however, enjoyed annual returns of 6–7%. The three American universities with the largest endowments enjoyed annual returns of 10.2% on their assets from 1980–2010. Moreover, for American universities, there is strong positive correlation between endowments size and rate of return."). If this is so, then large fortunes have an additional advantage.

[132] Turnier & Harrison, *supra* note 127, at 798.

[133] Kades, *supra* note 19, at 185–86.

grow by 2.8% per year, which means that if trust wealth grows at 5% per year, "it is relatively easy for wealth growth to exceed descendant growth."[134] And even if this calculation proves incorrect—if, for example, the average number of children per person is more than two, or if future rates of investment growth fail to clear 5%—trusts can be written with specifications intended to preserve principal.[135] A trust can be written to mimic the old laws of primogeniture, marking as beneficiaries, for example, only one child per generation;[136] or trusts could limit beneficiaries to those who share the settlor's last name, or randomly select some number of children per generation as beneficiaries.[137] Trusts are customizable.[138]

One other problem—one long recognized—is that the further one progresses in time, the harder it is to imagine what the world will be like. Carefully drafted trusts intended to maximize one's descendants' opportunities in the present-day become less likely to achieve their ambitions the more the world changes.[139] Society is mercurial, and many things, it is true, change over long periods of time in ways that cannot be predicted. But where once the limit to remote vesting was prescribed by the rule against perpetuities, and thus lay at no more than a century, now the limit lies purely in the imagination and planning of trust settlors. A well-planned trust projects wealth down the generations according to a settlor's desires.

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134 *Id.* at 168.

135 For a creative list of options, see John V. Orth, *Escaping the Malthusian Trap: Dynasty Trusts for Serious Dynasts*, 17 GREEN BAG 2D 29, 34–35 (2013). Among other possibilities, a settlor who wants to maintain a dynasty may write the trust so as to make distributions to

> a finite number of the most nearly related descendants, preserving the affluence of at least certain members of each generation. Minimum amounts (indexed for inflation) could be prescribed to guarantee that distributions would be sufficient to maintain the recipients at an appropriate level of economic and social standing. The Malthusian effect could be further countered by limiting the number of children of any one descendant who could receive a distribution, encouraging reproduction at or below the replacement rate. To address fears that the family standard-bearer might not continue to uphold the family honor (however defined), a self-renewing panel of trust protectors might be empowered periodically to review the representative's performance according to some ascertainable standard and allocate or re-allocate income accordingly.

Id.

136 If it seems unrealistic that a settlor would want to do this, then that may be because of social assumptions about settlors' motivations in our time. The practice was common in seventeenth-century England. Katherine French, Book Review, 28 SIXTEENTH CENTURY J. 314, 315 (1997).

137 See, for example, the use of the "strict settlement" as an estate conveyance by English landowners in the seventeenth century. John V. Orth, *Does the Fee Tail Exist in North Carolina?*, 23 WAKE FOREST L. REV. 767, 776–77 (1988).

138 *See, e.g.*, John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2194 (2016) (detailing the history of the use of trusts for business transactions).

139 This is a variation of the efficiency reasons to oppose dead hand control. *See supra* note 107 and accompanying text.

B. The Loss of an Anti-Aristocratic Principle

Although few have claimed that the rule against perpetuities fully ensured equality of opportunity, now that it is gone, its role in maintaining a certain kind of antidynastic equality of opportunity has become visible. Inheritance of most kinds, of course, has repercussions for equality of opportunity,[140] and the Rule was a gentle intrusion on the disposition of wealth into future generations.[141] It implied no inheritance tax, for example.[142] But the Rule stood as a hurdle to the formation of dynastic wealth, enforcing a rougher measure of intergenerational mobility implied by the phrase "shirtsleeves to shirtsleeves in three generations," a rule of thumb regarding the challenges of wealth concentration and diffusion.[143]

Traditionally, the common law Rule has been said to advance two policies: limiting dead hand control and keeping property marketable.[144] First, the rationale to keep the disposition of wealth in the hands of current generations runs deep in the intellectual history of trusts and estates scholarship. "It is socially desirable," wrote Professor Lewis Simes, "that the wealth of the world be controlled by its living members and not by the dead."[145] This view stretches back in the American imagination to Thomas Jefferson, who wrote to James Madison that "[t]he earth belongs always to the living generation. They may manage it then, and what proceeds from it,

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140 *See, e.g.*, Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 71 (1990) ("[W]e tend to believe the field is as level as we can make it. It is not. For no particularly good reason, we allow some players, typically those most culturally and educationally advantaged, to inherit huge amounts of wealth, unearned in any sense at all."); Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 469, 473–74 (2007) (explaining the implications of inheritance taxation on equal opportunity); D.W. Haslett, *Is Inheritance Justified?*, 15 PHIL. & PUB. AFFS. 122, 136–37 (1986) (examining the moral question of the inheritance of economic power).

141 *See, e.g.*, Haskins, *supra* note 15, at 46 ("The rule meant that what had once been considered a perpetuity was one no longer.").

142 In the United States, the inheritance tax in its modern form dates to the nineteenth century. *See* Solomon Huebner, *The Inheritance Tax in the American Commonwealths*, 18 Q.J. ECON. 529, 529–30 (1904). For proposals to reform inheritance taxation, see, for example, Batchelder, *supra* note 1, at 2; Anne L. Alstott, *Family Values, Inheritance Law, and Inheritance Taxation*, 63 TAX L. REV. 123, 125 (2009).

143 *See, e.g.*, Iris J. Goodwin, *How the Rich Stay Rich: Using a Family Trust Company to Secure a Family Fortune*, 40 SETON HALL L. REV. 467, 469 (2010); Wolven & Clemons, *supra* note 105, at 553 ("We still live in a world where the failure of wealth transfer gives rise to clichés such as 'shirtsleeves to shirtsleeves in three generations.' The first generation creates the wealth, the second generation (under the watchful eye of the first) preserves it, and the third knows no better and spends it. The fourth has to start all over again, from shirtsleeves to shirtsleeves.").

144 Sitkoff & Schanzenbach, *supra* note 88, at 365.

145 Lewis M. Simes, The Policy Against Perpetuities: Dead Hand vs. Living Hand, Lecture at the University of Michigan (Feb. 9, 1955), *in* THE THOMAS M. COOLEY LECTURES: PUBLIC POLICY AND THE DEAD HAND 55, 59 (1955).

as they please during their usufruct."[146] It is, on this account, a matter of fairness between the generations that one not tie up the disposition of wealth unduly more than any other.[147] This is not only a principled matter of maintaining each generation's freedom,[148] but a practical concern about efficiency.[149] Settlors cannot see the future, and thus they might set constraints on trust distributions or investments that appear wise at the time but end up foolish or outlandish two centuries later.[150] That is why, on this view, the rule against perpetuities exists.

The second traditional justification for the Rule was to keep property marketable.[151] On this idea, allowing people to sell their property when they wish provides benefits to the overall economy.[152] This was of particular concern during the early years of the Rule's development in England, when future interests in trust—as well as wealth generally—were mostly in land.[153] This is no longer the case in the United States: most trusts are in personal property, and most trust instruments specify that trustees have powers to sell trust property and reinvest the proceeds.[154] Thus, the marketability justification for the Rule has arguably fallen out of fashion.[155]

Now that the Rule has been abrogated, and it is possible to understand more fully its role and operation in American property law,[156] this Article

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[146] *Id.* (quoting Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 6 THE WORKS OF THOMAS JEFFERSON 3, 9 (Paul Leicester Ford ed.,1904)).

[147] Sitkoff & Schanzenbach, *supra* note 88, at 365.

[148] *See* Simes, *supra* note 145, at 59–60 (quoting HENRY SIDGWICK, ELEMENTS OF POLITICS 99 (Cosimo Classics 2005) (1891)).

[149] *See* T.P. Gallanis, *The Rule Against Perpetuities and the Law Commission's Flawed Philosophy*, 59 CAMBRIDGE L.J. 284, 292 (2000).

[150] *Id.* at 284 ("[I]t has been argued that reducing the power of the Rule would create inefficiencies because donors cannot foresee the future; they might put limitations on the use of property that seem reasonable under present circumstances but become unreasonable over time, and without the Rule future generations would be powerless to alter or abandon these limitations.").

[151] Sitkoff & Schanzenbach, *supra* note 33, at 365.

[152] Dukeminier & Krier, *supra* note 119, at 1320.

[153] *Id.*

[154] *Id.* at 1321; *see, e.g.*, Palms v. Palms, 36 N.W. 419, 432 (Mich. 1888) ("The trustees are authorized under the will to sell, lease, or repair any of the property; to invest and reinvest the proceeds of sales in lands, and in interest and dividend paying securities, and 'to do all acts . . . that I might do, if alive.' . . . The trustees can be constantly buying and selling, changing daily, if they see fit, the nature and character of the property intrusted to their care."); *see also* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 629 (1995) ("The trust originated as a conveyancing device for holding real property, often ancestral land. The modern trust has become a management regime for a portfolio of financial assets.").

[155] *See, e.g.*, Dukeminier & Krier, *supra* note 119, at 1321 (explaining that in almost every state today that permits perpetual trusts, the trustee must have the power to sell trust assets, allaying marketability concerns).

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

will suggest that the Rule also played a role in deterring the formation of dynasties. A rough policy, fashioned over centuries by common law judges, maintained a headwind against hereditary wealth.[157] Earlier twentieth-century commentators often noticed this policy.[158] Professor W. Barton Leach, for example, noted the "threat to the public welfare from family dynasties built either on great landed estates or on great capital wealth," but concluded that graduated estate and income taxes had largely obviated this concern.[159] Professor Lewis Simes agreed with this assessment: "I feel that undue concentration of wealth is an evil which can best be combatted by tax legislation, rather than by perpetuity rules."[160] And this seems to be true. Well-tailored public laws like taxes aimed at preventing undue concentration of wealth allow more leeway to policymakers than courts have in applying the common law. Living, as Simes and Leach did, in a world in which the Rule, as well as inheritance taxes on large fortunes, appeared to be under no threat, perhaps gave cause to focus on more efficient mechanisms for preventing undue wealth concentration.

But now that the Rule has disappeared, and inheritance taxation on large fortunes has lessened—and has, indeed, come close to being eliminated[161]—a reappraisal has begun. The Rule, as it developed in the common law, was a compromise between different policy goals. These included rewards to industriousness, including by permitting people to bequeath money to their

[157] *See, e.g.*, Ascher, *supra* note 8, at 1165 ("Locking up trust funds in perpetuity through generations of a family smacks of aristocracy . . . . Although experts differ . . . it is hard to deny that, at least symbolically, the widespread allowance of such trusts by the legal system seems antidemocratic. My own conclusion is that the Rule against Perpetuities has for centuries struck a reasonable balance between the interests of wealthy families and of society as a whole and thus should be retained in some form." (quoting RONALD CHESTER, FROM HERE TO ETERNITY? PROPERTY AND THE DEAD HAND 116 (2007))).

[158] *See, e.g.*, Jabez Fox, *The Criticism of Cases*, 6 HARV. L. REV. 195, 195 (1892) (quoting Lord Keeper Guildford, a seventeenth-century judge, for the proposition that "[i]f in equity you should come nearer to a perpetuity than the rules of common law would admit, all men, being desirous to continue their estates in their families, would settle their estates by way of trust, which might indeed make well for the jurisdiction of the court, but would be destructive to the commonwealth").

[159] Leach, *supra* note 64, at 727.

[160] Simes, *supra* note 145, at 57.

[161] *See, e.g.*, Kades, *supra* note 19, at 180 ("The House version of the 2017 tax bill would have eliminated the estate and gift tax entirely, and powerful forces continue their campaign to achieve that end.").

children and grandchildren,[162] freedom of testation,[163] marketability,[164] future-oriented efficiency,[165] and equity between the generations.[166] It was also informed, on the shirtsleeves-to-shirtsleeves account, by a particular vision of equal opportunity within generations.

"Shirtsleeves to shirtsleeves in three generations" is a proverb about how wealth builds and dissipates over time. On this idea—an old one[167]—when one generation builds wealth, the succeeding two generations are likely to spend it, bringing the cycle of a family's wealth full circle by the end. The story is commonly told in estate planning circles, where it is recommended, to take one example, that estate advisors

> not lose sight of the "shirtsleeves to shirtsleeves in three generations" metaphor. A young, aggressive person labors long and hard to build up a fortune in a successful business. The second generation manages it with more or less diligence, while the third generation manages to spend the largess freely, thereby achieving an economic level equal to that where the grandfather began.[168]

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162 See, for example, how the court in *Palms v. Palms*, a canonical perpetuities case, framed the compromise:

> It is argued that the policy of the law invites the immediate breaking up of large estates, and the general division as soon as possible of the money, so that it can be thrown out to the commons, and gathered up in small portions by the lucky ones who may have the opportunity of so doing, so that the wealth of the country may be as evenly distributed as possible. Granting that this may be so, there is as yet no law that imposes upon any man the duty of placing his earnings and savings at his death in the hands of those who will squander and dissipate them the quickest, nor any prohibition against his passing by his children, and bestowing his fortune upon his grandchildren, even if by so doing he keeps such fortune intact while his children live.

36 N.W. 419, 432 (Mich. 1888).

163 *See, e.g.*, Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 617 n.39 (2009) ("The traditional temporal boundary on freedom of testation is set by the Rule Against Perpetuities . . . .").

164 *See supra* note 106 and accompanying text.

165 *See supra* note 149 and accompanying text.

166 *See supra* note 148 and accompanying text.

167 *See* Kades, *supra* note 19, at 201 n.285 (describing the phrase's history).

168 17 ILL. PRAC., ESTATE PLANNING & ADMINISTRATION § 9:3 (4th ed.); *see also* Randall D. Fisher, *Business Succession and Asset Protection for Maryland Agri-Business*, MD. BAR J., Sept.–Oct. 2017, at 34, 38 ("The 'shirtsleeves to shirtsleeves in three generations' saying is so true that nearly every culture on the planet has some version of it, including a 2,000-year-old Chinese proverb."); 20 ILL. PRAC., ESTATE PLANNING & ADMINISTRATION § 288:11 (4th ed.) ("[I]t is worth the best efforts of the family lawyer to help find a way to carry on, even build the family business. That would defy the adage, 'Shirtsleeves to shirtsleeves in three generations,' that is so frequently proven in every community in America."); Anne Marie Levin, *Biographical Bequest: A Lasting and Meaningful Legacy*, 46 EST. PLAN. 42, 43 (2019) ("[O]ne reason for the well-known saying, 'shirtsleeves-to-shirtsleeves in three generations' is that 'the individuals in the third and fourth generation often have no connection to the source of their family's financial wealth.'").

Statistics compiled by estate-planning journals also apparently indicate that 60% to 70% of wealth transfers fail "by the end of the second generation."[169] Thus, on the shirtsleeves-to-shirtsleeves account, the spending habits of profligate heirs who control the wealth they inherit help to deter the formation of aristocracy.[170] Well-drafted perpetual trusts can get around this problem, maintaining wealth even in the case of profligate heirs.[171]

It may be said, with Leach and Simes, that there are better ways to deter aristocracy or support equal opportunity, like inheritance taxes.[172] But the rule against perpetuities was a policy fashioned by common law courts, which had no power to levy taxes or engage in any other public law approaches to the problem. A court applying the common law must use the principles of private law—here, the rules of property—to resolve the cases that come before it.

Moreover, if the Rule is an imprecise match for a policy favoring equal opportunity, the Rule is also an imprecise match for policies favoring marketability and restraints on dead hand control.[173] It has long been, as commentators have recognized, both underinclusive and overinclusive in furthering its historically understood purposes.[174] The Rule was meant to be

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169 Thomas C. Rogerson, *Back to the Future: The Central Role of Family Governance in Today's Estate Planning (Part 1 of a Two-Part Series)*, 48 EST. PLAN. 24, 26 (2021).

170 *See, e.g.*, Tait, *supra* note 112, at 987–88 (2020) ("Encapsulated in the universal aphorism 'shirtsleeves to shirtsleeves in three generations,' the knowledge that family wealth can be lost as quickly as it can be gained looms large, creating anxiety and prompting a search for solutions."); Kades, *supra* note 19, at 200 ("[A] separate equitable benefit of profligate heirs [is] the frittering away of large inheritances on high living has a strong tendency to reduce income and wealth inequality. Unless prodigal heirs' consumption preferences are quite odd, the beneficiaries of their spending will be a wide circle of common workers. For example, building a new mansion employs many laborers, including numerous relatively low-wage unskilled laborers."). Family dynasties lasting more than a few generations have been relatively uncommon. *Id.* at 199.

171 Jay L. Zagorsky, *Do People Save or Spend Their Inheritances? Understanding What Happens to Inherited Wealth*, 34 J. FAM. & ECON. ISSUES 64, 74 (2013) (suggesting that "for roughly every dollar inherited, people save roughly one-half and either spend, donate, or lose the rest").

172 *See, e.g.*, Alstott, *supra* note 140, at 473–74, 85–87 (explaining the implications an inheritance tax would have on equal opportunity). *But see* Felix B. Chang, *Asymmetries in the Generation and Transmission of Wealth*, 79 OHIO ST. L.J. 73, 95–96 (2018) ("First, as a mode of redistribution, the RAP is particularly efficient. The RAP affects the wealthy—those settlors who can create a dynasty trust with the requisite corpus of [the federal wealth transfer tax exemption]. Further, the RAP singles out settlors with dynastic aspirations.").

173 *See* Sitkoff & Schanzenbach, *supra* note 88, at 365–66.

174 *Id.*

The Rule is underinclusive because it only applies to contingent interests, but vested interests that will not become possessory for a long period of time can also compromise the Rule's underlying fit for several overlapping policy goals, and, as such, did not map perfectly onto any of them. Thus, in Leach's words, the Rule was "the last phase of a centuries-long battle fought by the English courts against the dynastic impulses of the nobility and landed gentry."[175]

But are settlors motivated by a desire to found dynasties? Professors Max Schanzenbach and Robert Sitkoff have argued that the rise of modern dynasty trusts is better explained by tax considerations than by a "dynastic impulse."[176] If such an impulse exists, it would have existed before Congress's 1980s tax code revisions and yet did not overcome the rule against perpetuities on its own.[177]

> policy objectives. It is overinclusive because if the trustee is given the power to sell the trust property and reinvest the proceeds, as is typical, there is no concern with marketability.

Id.

175 Leach, *supra* note 17, at 1330.

176 Schanzenbach & Sitkoff, *supra* note 59, at 2497. They note that "[i]t is also possible that donors desired perpetual trusts but could not overcome the transaction costs of settling a trust out of state in an era before cheap long distance calls, fax machines, and electronic mail," but they also note that Delaware was able to attract trust funds from out of state during the 1970s, suggesting transaction costs don't entirely explain the lack of dynasty trusts prior to the 1980s. *Id.* at 2495–96. Another interesting example for Schanzenbach and Sitkoff is Scotland, which has never had a rule against perpetuities, and in which, according to the English Law Commission, perpetual trusts tend to be "confined to public purposes." *Id.* at 2482. But Scotland does have a rule that effects a similar purpose to the rule against perpetuities, under which any person given a life estate by a trust who was not living when the trust was created automatically gets a fee simple right to that aspect of the trust property. *See* Dukeminier & Krier, *supra* note 119, at 1341 n.149. Schanzenbach and Sitkoff also note that "history is replete with efforts by one generation to control subsequent generations' disposition of the family patrimony." Schanzenbach & Sitkoff, *supra* note 59, at 2481.

177 *See* Dukeminier & Krier, *supra* note 119, at 1316–17 ("The background, after all, is disturbing. Passage of the GST tax, coupled with competition for highly mobile trust capital and trust business, has spurred state after state to abolish the Rule in one manner or another, and the trend shows no signs of abating. Notwithstanding all this activity, it appears that it was motivated not at all by any disenchantment with the Rule's central purpose of constraining the dead hand. As we have seen, perpetual trusts were available in Idaho, South Dakota, and Wisconsin well before the GST tax, yet they were seldom drafted—perhaps because most people recognized the hubris their use entailed."). Another possible reason why trust funds did not flood into Idaho, South Dakota, and Wisconsin before the late 1980s could concern the history of capital mobility. Economists have argued that it was not until the end of the twentieth century that capital mobility reattained the level it had reached in the nineteenth century, which had been disrupted by the World Wars and the Great Depression. *See, e.g.*, Maurice Obstfeld & Alan M. Taylor, *The Great Depression as a Watershed: International Capital Mobility over the Long Run* 1–3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 5960, 1997), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=225740 [https://perma.cc/HN47-G2MX] (surveying the evolution of capital mobility in the late nineteenth century); Alan M. Taylor, *International Capital Mobility in History: The Saving-Investment Relationship* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 5743, 1996), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4358 [https://perma.cc/9LXL-3VDZ] ("Broadly speaking, the inter-war period, and especially the Great Depression, emerge as an era of diminishing capital mobility, and only recently can we observe a tentative return to the degree of capital mobility witnessed during the late nineteenth century.").

Assertions for and against the existence of a dynastic impulse are complex and difficult to measure. "A transferor," the *Third Restatement of Property* asserts, "by nature prefers to benefit known descendants, not remote unknown descendants. Instinctively, though perhaps not consciously, a transferor understands that his or her genetic relationship with his or her descendants will be diluted at each step down the generational ladder."[178] Yet, in contrast, a survey of perpetual-trust advertisements by Joshua Tate concluded that while tax benefits were a prominent part of such advertisements, they were not the only part.[179] Other advantages the advertisements promoted included "the ability to protect family wealth from beneficiaries' bad judgment or misfortune," "the ability to prevent imprudent spenders, or those who are not financially responsible, from wasting their inheritance," and to "prevent the trust assets from going to creditors of the beneficiaries."[180]

Settlors' motives are likely wide-ranging. But were there no impulses to control who benefited from their wealth long into the future, then perhaps there would have been no need for the Rule in the first place. That governments were convened on the basis of familial power for so long[181] suggests a dynastic impulse existed; at least at some times in history, some people wanted to empower their remote heirs. Finally, if modern-day settlors are choosing perpetual trusts for tax reasons, it does not seem to change the result. A rule that lay as a barrier to the formation of dynasties has been removed.

III. COMPLEXITY AND THE POLITICS OF WEALTH DEFENSE

Equal opportunity, as an ideal, continues to enjoy widespread support among the public.[182] Americans also support taxes on large fortunes at death

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178 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS ch. 27, intro. note (AM. L. INST. 2011).

179 Tate, *supra* note 98, at 613–15.

180 *Id.*

181 *See, e.g.*, Graziella Bertocchi, *The Law of Primogeniture and the Transition from Landed Aristocracy to Industrial Democracy*, 11 J. ECON. GROWTH 43, 44 (2006) ("We start from the observation that, at least in the European experience during the past ten centuries, agrarian societies tend to be inherently aristocratic . . . .").

182 *See, e.g.*, *2021 National Poll on Reimagining Rights and Responsibilities in the U.S.*, HARV. KENNEDY SCH.: CARR CTR. FOR HUM. RTS. POL'Y, https://carrcenter.hks.harvard.edu/reimagining-rights-responsibilities-2021-poll [https://perma.cc/BE7C-KSHV] (finding that 84% of respondents agree that "before America can be truly united, we need to give equal opportunity to the 'have's' and the 'have not's'").

that they would not support during life[183]—suggesting a preference for curtailing intergenerational wealth. And yet, in the last forty years, the legal treatment of inheritance has shifted decisively in the other direction: a rebalancing to allow wealthy settlors to project their fortunes further down the generations than at any time since the seventeenth century. This happened with little public debate, as state after state abrogated the common law and enacted new laws with which nearly all the trusts and estates professors disagreed.[184]

The dynamic is surprising, and explaining it requires going beyond the narrow doctrinal questions that have been the traditional focus of trusts and estates scholarship. In particular, it implicates what the political scientist Jeffrey Winters calls "the much harder question of how today's yawning disparities of wealth can persist and even widen under conditions of significant gains in popular participation and obvious political freedom."[185] Why should popular government policy goals like preventing the formation of dynastic wealth fall away under these conditions?

In this Part, the Article will develop a partial answer. It will suggest that a broader theory of wealth defense helps to explain the narrow technical history of the demise of the rule against perpetuities while drawing out the lessons for future reform. In part, it was complexity that doomed the Rule: a simpler policy, easier to apply by judges and to comprehend by citizens, might have mobilized more forces in its defense.

A. A Politics of Wealth Defense

If it was wealthy trust settlors who were the ultimate beneficiaries of the abandonment of the rule against perpetuities,[186] then their influence in the state and federal legislative measures removing the Rule must be accounted

183 *See, e.g.*, Zachary Liscow & Edward Fox, *The Psychology of Taxing Capital Income: Evidence from a Survey Experiment on the Realization Rule*, J. PUB. ECON., Aug. 3, 2022, at 1, 8. Public opinion on inheritance taxation has been difficult to gather, based in part on the fact that surveys with differently worded questions yield conflicting results. *See* Mayling Birney, Michael J. Graetz & Ian Shapiro, *Public Opinion and the Push to Repeal the Estate Tax*, 59 NAT'L TAX J. 439, 441 (2006) ("[P]olls show that . . . support for repeal [of an inheritance tax that only affected the wealthiest 2% of Americans] remains surprisingly strong. Principled judgments about fairness, which were often primed by question wording, are as important as appeals to self-interest. That said, when asked to consider its priorities or the possibility of a higher exemption, the public's verdict typically shifts so that the large majority then is found to *support* retaining the estate tax in a reformed version.").

184 *See supra* note 100 and accompanying text.

185 Jeffrey A. Winters, *Wealth Defense and the Complicity of Liberal Democracy*, 58 NOMOS 158, 206 (2017).

186 *See, e.g.*, Tait, *supra* note 112, at 1022 ("These benefits [to high-wealth families] have included . . . the elimination of perpetuities restrictions . . . ."); Ascher, *supra* note 8, at 1160–61 ("[I]n the final analysis, the only real beneficiaries [of perpetual private trusts] will be the trustees and the lawyers.").

for. It is a politics of wealth defense, whereby large fortunes draw upon skilled and motivated professionals to defend themselves against democratically supported redistribution, that helps account for the incentives that underlay the Rule's fall. Because of the Rule's complexity, it was especially vulnerable to this dynamic.

For example, political scientists like Winters and Benjamin Page have argued that oligarchical dynamics are at play in the American lawmaking process.[187] The theory develops an ancient idea about how such dynamics are compatible with both democracy and the rule of law.[188] "The literatures on oligarchy and democracy usually view the two political arrangements as mutually exclusive. We view them as compatible and often fused."[189] This account does not challenge the fact that the United States is a republic with the rule of law, free and fair elections, and democratic accountability. And while this definition of oligarchical dynamics—in particular, about what threshold of wealth counts as oligarchical[190]—remains in some ways elusive, the notion of wealth defense as a particular kind of politics offers insights into the rule against perpetuities' fall.

Wealth defense is a theory of power and how it is exercised.[191] On this view, material and social stratification cause "actors who claim or own concentrated personal wealth and are uniquely empowered by it" to engage in a politics of defending their wealth.[192] Wealth has been of interest to political theorists since Aristotle, from whom Winters and Page's definition derives,[193] perhaps because possessing great wealth offers the means and incentives to engage in "the core political objective of wealth defense

187 *See* Jeffrey A. Winters & Benjamin I. Page, *Oligarchy in the United States?*, 7 PERSPS. ON POL. 731, 733–38 (2009).

188 *Id.* at 731. This is in contrast to theorists who saw democracy and oligarchy as incompatible. *See generally* Darcy K. Leach, *The Iron Law of* What *Again? Conceptualizing Oligarchy Across Organizational Forms*, 23 SOCIO. THEORY 312, 312–15 (2005) (discussing a theory developed by Robert Michels about the inevitability of oligarchy in organizations).

189 Winters & Page, *supra* note 187, at 732.

190 For example, the theory specifies that oligarchs are in a different category from the "merely rich," but concedes that the line is hard to draw. JEFFREY A. WINTERS, OLIGARCHY 216 (2011) ("[H]ow much wealth and material power is needed to make someone an oligarch in the United States? Designating any particular income or wealth level as a line of demarcation is necessarily arbitrary. The significance of being designated an oligarch lies in the power capacities certain individuals derive from their personal wealth.").

191 *Id.* at 211.

192 *Id.*

193 Oligarchical politics, for Winters and Page, "involves the exercise of power by the *richest* citizens—who happen always to be 'the few.'" Winters & Page, *supra* note 187, at 732 (quoting ARISTOTLE, THE POLITICS AND THE CONSTITUTION OF ATHENS III, viii 1279b, 35–39 (Stephen Everson ed., Benjamin Jowett trans., Cambridge Univ. Press 1996).

(which, depending on the national and historical context, means property defense, income defense, or both)."[194]

In rule-of-law democracies, wealth defense takes two forms. "One is hiring the services of armies of professionals—lawyers, accountants, lobbyists, wealth management agencies—who have highly specialized knowledge and can navigate a complex system of taxation and regulations."[195] The other is taking on the "political battles and legwork of making and keeping the tax system sufficiently porous so that there is complexity and uncertainty."[196]

Stated differently, wealth defense involves figuring out how to use currently existing laws to one's advantage, as well as changing those laws when they are insufficient, in ways that an informed electorate does not generally support.[197] While the theory does not specify how extreme material wealth inequalities need to be in order to enable wealth defense through policy,[198] it is compatible with recent research concluding that wealthy citizens exert more influence over public policy than their nonwealthy counterparts do.[199]

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194 Winters & Page, *supra* note 187, at 732.

195 WINTERS, *supra* note 190, at 213.

196 *Id.* at 213–14. The account is, in part, historical. "[O]ligarchs submit[ed] to laws in exchange for states guaranteeing property rights." *Id.* at 208.

197 Winters & Page, *supra* note 187, at 738.

198 Winters and Page note, for example, that

> membership in an oligarchy is not likely to be dichotomous (yes or no) but rather a matter of degree; the top five hundred or one thousand wealth-holding households in the US, for example, are likely to wield far more political power than their less extravagantly wealthy compatriots among the next few thousand.

Winters & Page, *supra* note 187, at 737. Previous, non-wealth-based theories of oligarchy and elite power in the twentieth century sometimes also came under criticism as insufficiently testable. *See, e.g.*, Robert A. Dahl, *A Critique of the Ruling Elite Model*, 52 AM. POL. SCI. REV. 463, 469 (1958) (suggesting that "the evidence for a ruling elite . . . has not been properly examined" due to a lack of "satisfactory criteria to determine what constitutes a fair test"); James L. Payne, *The Oligarchy Muddle*, 20 WORLD POL. 439, 439–45 (1968) (framing oligarchies as a combination of group types and "power attributes," and noting the "difficult problems of collecting and interpreting evidence" for such a model).

199 Winters & Page, *supra* note 187, at 738 (first citing Larry M. Bartels, Economic Inequality and Political Representation, Presented at the Annual Meeting of the American Political Science Association, Boston (Aug. 2002); then citing Martin Gilens, *Inequality and Democratic Responsiveness*, 69 PUB. OP. Q. 778, 778 (2005); and then citing Lawrence R. Jacobs & Benjamin I. Page, *Who Influences US Foreign Policy?*, 99 AM. POL. SCI. REV. 107, 107 (2005)). These data do not establish the theory of sustained oligarchical power that Winters and Page advance, but they do establish some influences among income, wealth and public policy. Winters & Page, *supra* note 187, at 738. For a more recent survey of wealth's influence over American policymaking, see, for example, David Broockman & Neil Malhotra, *What Do Partisan Donors Want?*, 84 PUB. OP. Q. 104 (2020).

Wealth defense matches the dynamics that trusts and estates scholars have outlined in the erosion of the rule against perpetuities.[200] In the history that Professors Jesse Dukeminier and James Krier describe, in enacting the generation-skipping transfer tax, Congress intended to close a loophole by which the wealthy avoided inheritance taxation by giving successive life estates to each generation down the line from their own children—grandchildren, great-grandchildren, and beyond.[201] The descendants did not have to pay inheritance taxes on the principal because it did not transfer between them; the tenancy of each beneficiary simply ended.[202] In closing this loophole, Congress also "lightened the taxpayer burden" by providing an exemption from the generation-skipping transfer tax for each transferor—initially $1 million, with periodic increases since.[203] Congress, Dukeminier and Krier conclude, "probably assumed that most states would continue to adhere to the Rule against Perpetuities in one or another variation, but this . . . proved unfounded."[204]

Settlors, trustees, and local financial institutions realized what Congress had likely not: now, the limits to escaping the generation-skipping transfer tax lay solely in states' Rules against Perpetuities, and such Rules could be removed. Changing state laws would provide lower taxes on trust funds, as well as longer-term control than had been allowed by the common law of almost every state. Thus, state laws were changed. The beginning of the Rule's demise—the mid-1980s—corresponds with the rise of the new wealth consolidation.[205] At the same time, the estates scholars who widely agreed with the Rule's purpose, if not its particular evolution, were unable to rally popular support for a doctrine that was confusing for nonspecialists. As one trusts professor has observed, "[w]hen the relevant committee of the local bar association recommends a package of proposed changes to the probate code, no bells begin to ring and no warning lights begin to flash."[206]

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200 WINTERS, *supra* note 190, at 209 ("Policies intended to prevent transgenerational aristocracy do not undercut the material power of oligarchs during their lifetimes, although they do stimulate many oligarchs to engage services to help them defend their material positions for those who survive them in death.").

201 Dukeminier & Krier, *supra* note 119, at 1312.

202 *See, e.g.*, *id.* at 1312 ("At the death of a life tenant, the tenancy ends, leaving no transfer to be taxed.").

203 *Id.* at 1313.

204 *Id.* One additional limitation lay in the "Delaware Tax Trap" of I.R.C. sections 2041(a)(3) and 2541(d), which, under certain conditions, makes powers of appointment taxable events when they have the effect of postponing the period of the rule against perpetuities. *See* Jonathan G. Blattmachr & Jeffrey N. Pennell, *Adventures in Generation-Skipping, or How We Learned to Love the Delaware Tax Trap*, 24 REAL PROP., PROB. & TR. J. 75, 82 (1989).

205 *See* Piketty & Zucman, *supra* note 27, at 1325 fig.15.15.

206 Ascher, *supra* note 8, at 1174.

The financial firms who lobbied state legislatures for the Rule's removal were better situated than the public, as well as the state and federal legislatures themselves, to understand the complex dynamics and incentives in the law of wealth transfers.[207] Helping settlors to organize their wealth to provide maximal inheritances had long been the business of trusts and estates advisers.[208]

The repeals of the rule against perpetuities were, on this account, the latest salvo in a longtime policy conflict between wealthy fortunes and regulation aimed to prevent undue wealth concentrations.[209] Inheritance taxes were introduced to fund particular government projects;[210] then, settlors and their advisors found ways to get around this purpose by writing trust instruments granting successive life estate interests to future generations;[211] realizing this, Congress sought to prevent it by imposing a tax (the generation-skipping transfer tax) on these kinds of transfers;[212] to escape the new tax, financial firms swiftly succeeded in changing state perpetuities laws. Those who wish to regulate and diminish the long-run accumulation of wealth across generations should take note of this dynamic and consider the incentives for evasion or quiet repeal that future reforms will generate.

Does one need, an objection might go, the idea of wealth defense to explain this history? One might conclude that the race to abolish the rule against perpetuities is aptly described by ordinary interest-group politics. "Even if attracting business does not directly increase the state's tax revenue," two scholars write, "local interest groups nonetheless may benefit from, and hence lobby for, laws that will attract business to the state."[213] But wealth defense adds an explanation for why these local interest groups existed—why they would benefit from the Rule's removal, and why they would endure over time. Local financial interests benefited only because

207 *Cf.* Rollison, *supra* note 8, at 160 ("[E]state planning is not, in modern law, a job for the amateur or the general practitioner—it is a task for the expert. It involves a wide range of knowledge and the ability to use it.").

208 For a history of estate planning, see generally Rollison, *supra* note 8.

209 *See* Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223, 226–30 (1956) (detailing the movement in the late nineteenth and early twentieth centuries to establish inheritance taxes in order to prevent the undue accumulation of aristocratic wealth, and Congress's initial intransigence).

210 *See* Sitkoff & Schanzenbach, *supra* note 88, at 370.

211 *Id.*; Dukeminier & Krier, *supra* note 119, at 1312.

212 Sitkoff & Schanzenbach, *supra* note 88, at 371.

213 *Id.* at 363. This model of interest-group politics is informed by theories of jurisdictional competition for corporate charters. *Id.* (citing William J. Carney, *The Political Economy of Competition for Corporate Charters*, 26 J. LEGAL STUD. 303 (1997); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987); Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1143–49 (2002)).

there were enough trust settlors who had large enough fortunes to want dynasty trusts.[214] The wealth defense theory specifies that wealthy interests are a continuous feature of democratic politics, and that policy complexity is, all else equal, an asset to wealth defense in the long run. The idea of wealth defense also provides a longer-term explanation for the history of resistance to policies intended to impede aristocratic wealth.

B. The Information Structure of Complex Rules

The history of the rule against perpetuities' demise makes concrete some drawbacks that complexity poses for effective regulation.[215] In spite of the popularity among estates scholars of the rule against perpetuities' general goals,[216] states rushed to remove the Rule in order to compete for fees from trust management firms: a primary constituency with a strong understanding of and interest in the Rule.[217] The Rule's complexity was an asset to the local financial firms and trust lawyers who lobbied for its end.

The legal literature on complexity has often focused on exhorting lawmakers to use plain language to describe the rules they make, on the view that complexity's drawbacks, whatever they might be, are resolved when complex laws are accurately communicated to legal officials and the public.[218] But the complexity of the underlying legal rule, not just the language that describes it, has a particular drawback in inheritance law. Few

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[214] *See, e.g.*, Emily S. Taylor Poppe, *Surprised by the Inevitable: A National Survey of Estate Planning Utilization*, 53 U.C. DAVIS L. REV. 2511, 2556 (2020) (confirming in a study that "estate planning is more prevalent among those with higher incomes and greater wealth").

[215] For more general analysis of the complexity of modern finance, see, for example, Saule T. Omarova, *Wall Street as Community of Fate: Toward Financial Industry Self-Regulation*, 159 U. PA. L. REV. 411, 416 (2011) ("Given the complexity and global nature of the modern financial market, any government's attempt to regulate it in a purely unilateral command-and-control manner will inevitably encounter the fundamental problem of regulatory arbitrage, whereby financial institutions find new ways to get around government rules, thus creating a never-ending spiral of rulemaking and rule evading."); John C. Coffee Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1028 (2012) ("Unfortunately, systemic risk is a complex and relatively opaque concept with which the average citizen does not easily identify.").

[216] *See supra* notes 77–84 and accompanying text.

[217] *See supra* note 90 and accompanying text.

[218] *See, e.g.*, CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 185 (2013) ("The Plain Writing Act of 2010 . . . should help to promote clarity, because it is designed to ensure that when government communicates with citizens, it does so in a way that people can easily understand."). Others have suggested that simplified descriptions of complex laws necessarily leave out aspects of the underlying legal rules. *See, e.g.*, Joshua D. Blank & Leigh Osofsky, *Simplexity: Plain Language and the Tax Law*, 66 EMORY L.J. 189, 193–94 (2017) (using the term "simplexity" to describe this phenomenon and exploring its inherent challenges); Thomas E. Webb & Robert Geyer, *The Drafters' Dance: The Complexity of Drafting Legislation and the Limitations of 'Plain Language' and 'Good Law' Initiatives*, 41 STATUTE L. REV. 129, 156 (2020) (positing that complexity is "an inherent part of the process" of law and policy, and that "[l]earning how to recognize and manage it is of primary importance").

rules have been explained more often than the rule against perpetuities. Casebooks,[219] law reviews,[220] practice guides,[221] and bar preparatory courses[222] have explained the Rule to generations of law students in plain language, and so we must conclude that it is the complexity of the Rule itself, and not its explanations, that has proved perplexing to each generation.[223] Simpler revisions to the Rule, like the ninety-year uniform Rule, avoided much of the complexity of the wait-and-see test, but the precise externalities that even the revised Rule sought to prevent remained elusive. The Rule's history suggests a theory of costs to complexity in inheritance law.

First, complexity causes inequalities of information.[224] When a law regulating large fortunes is hard to understand, the rewards to understanding it will be concentrated among those who have the most to gain from doing so—wealthy settlors and their advisers and advocates. Members of the general public, who benefit from policies that keep property marketable, limit the inefficiencies of dead hand control, and curtail the projections of large fortunes from one generation into aristocracies in the next, have less incentive to verse themselves in the workings of the law. Estates professors who understand complex laws like the rule against perpetuities found the Rule's complex rationales difficult to convey to enough legislators or members of the public to counteract this information divide. For similar reasons, complexity in inheritance law also allows for the spread of false

[219] *E.g.*, ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 897 (11th ed. 2021); JOSEPH WILLIAM SINGER ET AL., PROPERTY LAW: RULES, POLICIES, AND PRACTICES § 5.3 (7th ed. 2017).

[220] *See, e.g.*, Fox, *supra* note 158, at 195 (discussing historical views of the Rule's purpose); *Recent Cases*, 64 HARV. L. REV. 853, 864 (1951) (describing the Rule's significance in a recently decided case); W. Barton Leach, *Perpetuities Legislation, Massachusetts Style*, 67 HARV. L. REV. 1349, 1350 (1954) (describing the Rule with an emphasis on its common law definition).

[221] *E.g.*, 41 LONNIE E. GRIFFITH JR. & THOMAS SMITH, OHIO JURISPRUDENCE § 180 (3d ed. 2022); 3 JOHN A. BORRON JR., SIMES AND SMITH: THE LAW OF FUTURE INTERESTS § 1410 (3d ed. 2022); 28 MICHAEL PILL, MASSACHUSETTS PRACTICE: REAL ESTATE LAW § 1:22 (4th ed. 2021).

[222] *E.g.*, *Bar Exam Essay Questions: Five Secrets to Essay Success*, THEMIS BAR REV. https://www.themisbar.com/successful-essay-writing-on-the-bar-exam [https://perma.cc/W43R-DSM5] ("You've got the Rule Against Perpetuities down cold (maybe...).").

[223] Even John Chipman Gray's widely quoted, single-sentence description of the Rule has been described as "brief and deceptively simple." Paul G. Haskell, *A Proposal for a Simple and Socially Effective Rule Against Perpetuities*, 66 N.C. L. REV. 545, 545 (1988).

[224] This has also been recognized in the tax context. *See, e.g.*, Jacob S. Hacker & Paul Pierson, *Abandoning the Middle: The Bush Tax Cuts and the Limits of Democratic Control*, 3 PERSPS. ON POL. 33, 37 ("Surveys on tax issues reveal that F. Scott Fitzgerald was right: the very rich *are* different—not just in their preferences regarding tax policy but, crucially, in their level of knowledge with respect to various dimensions of this complex issue. Knowledge of the tax code is sharply skewed by income. In a 2003 poll, for example, a majority of the richest 5 percent of Americans answered the knowledge questions correctly. Only a fifth of other Americans did, with knowledge lowest among the poor. Only half of the respondents even knew there had been a tax cut in 2001.").

information.[225] This effect has most commonly been observed in the inheritance tax policy context, in which incorrect understandings about which inheritances are subject to tax have been widespread.[226] If there is less evidence of false beliefs about the rule against perpetuities among the general public, that may be because few members of the public have any beliefs at all about the Rule. We might describe this first inequality as spatial: it separates between differently situated present-day interests, skewing toward the defense of large fortunes and against society-wide benefits.

There is also a second, temporal dimension. The creators of inheritance rules, such as the common law judges who fashioned the rule against perpetuities, do not know how the world will change as the years go by. Our inability to know the future is in fact one of the rationales for the Rule's existence.[227] The common law judges who created the Rule were officials who had well-formed ideas about what the Rule was, how it operated, and the public policies they meant for it to accomplish.[228] They could not know about changes in the forms wealth would take—from land to financial assets[229]—or about changes to American law and society (including wealth concentration and ever-evolving federal tax law) that would make repealing the Rule particularly desirable for state trust industries and wealthy settlors. The modern-day legislators who authorized the Rule's removal knew about contemporary American law and society, but they did not know as much about what the rule against perpetuities was, how it operated, and what it was meant to accomplish. The politics of wealth defense benefitted from this information divide between present and past to quietly remove the Rule.

Information inequality benefits wealth defense in two ways. First, complexity allows trust lawyers and financial institutions to drive unforeseen applications of existing law.[230] Wealthy settlors draw upon well-resourced

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[225] *See* Kades, *supra* note 19, at 183 ("A small circle of wealthy families, through a persistent campaign of misinformation, have managed to convince many farmers, family restaurant owners, and others of relatively limited means that the federal government is going to take half of their modest wealth when they die despite the fact that the current estate tax applies only to multimillionaires—far fewer than 1% of Americans.").

[226] *See* Batchelder, *supra* note 1, at 3 (stating that "public awareness of the income tax exclusion for inherited wealth is limited. These misperceptions have been exploited by opponents of the estate tax, who have framed the estate tax as a double tax on frugal, hard-working donors who are ruthlessly taxed right at the moment of death.").

[227] See Schanzenbach & Sitkoff, *supra* note 88, at 365; SIMPSON, *supra* note 107, at 159–60; Gallanis, *supra* note 149, at 284; and the text accompanying these notes explaining the Rule's efficiency rationales.

[228] SIMPSON, *supra* note 107, at 159–60.

[229] *See, e.g.*, Sitkoff, *supra* note 99, at 508 ("In contrast to the days of old, in which the patrimony was typically ancestral land, wealth today generally takes the form of liquid financial assets, which are easily moved from one state to another.").

[230] *See,* WINTERS, *supra* note 190, at 213–14.

advisors with expertise to use existing laws to further their clients' goals, including in ways the law's drafters did not intend. Thus, it has been said that the rule against perpetuities prevented the control of trust distributions to new beneficiaries beyond about a century, as this covers an infant's expected lifetime at the creation of the trust plus twenty-one years.[231] But even though a century is allowed by the Rule's terms, estates professors and commentators in the twentieth century often said that writing a trust designed for new beneficiaries a century away was a "ploy," and against the Rule's spirit.[232] The only way to ensure a trust that would vest a century hence would be to choose "a dozen or so healthy babies from long-lived families as measuring lives."[233] While a trustee was permitted to do this, trust scholars commonly considered a century to be "an unconscionable period of time" for a trust to vest.[234] And yet, though initially denounced as a ploy, professors' suggested reforms to replace the Rule for a term of years were mostly set at ninety years, a plan that achieved widespread independent support.[235] What had been considered unconscionable by trusts scholars at mid-century had become a middle-of-the-road view by the 1980s.

Second, information inequality allows for unexpected changes to existing law.[236] Thus, the rule against perpetuities was abandoned in state after state. A uniform statutory period of ninety years was not enough to draw support from large trusts. Interests congenial to wealthy would-be dynasts recognized long-run tax advantages to dynasty trusts that the Congress that passed the generation-skipping transfer tax did not.[237] So, the Rule was replaced with statutory terms of centuries, millennia, or no terms.[238] Neither most legislators nor most of the public—nor most lawyers—were in a position to understand or defend the policy reasons for the rule against perpetuities' existence. The information inequality that the Rule's complexity engenders was exploited over time, and the Rule ceased to exist.

231 *See*, Dukeminier, *supra* note 60, at 1029 ("The longest period of time during which an expert lawyer can tie up property is about a century.").

232 *See, e.g.*, Waggoner, *supra* note 45, at 159 (quoting other professors describing the practice as a "ploy" and a "capricious exercise"); *see also* Sterk, *supra* note 67, at 2104 ("[I]f ninety years is unobjectionable, why not 150, or 200?"); Dukeminier, *supra* note 60, at 1057 (describing such actions as moving the Rule "away from a sensible reason supporting the common law perpetuities period").

233 Dukeminier, *supra* note 60, at 1029.

234 *Id.* at 1030 (quoting 6 W. BARTON LEACH, AMERICAN LAW OF PROPERTY § 24.16, at 52 (A. Casner ed., 1952)).

235 *See* Waggoner, *supra* note 45, at 158–59 and accompanying text.

236 *See, e.g.*, WINTERS, *supra* note 190, at 213–14.

237 *See, e.g.*, Schanzenbach & Sitkoff, *supra* note 59, at 2496.

238 Kades, *supra* note 19, at 147.

Thus, complex inheritance rules engender information asymmetry within and across generations. This dynamic advantages the interests of wealth concentration to the exclusion of the societal interests the rules are meant to protect. Over time, rule complexity can lead to laws being applied in ways that their creators did not expect, and, sometimes, to those laws ending altogether, even if their rationale remains undimmed.

C. *Lessons for Reform*

Although advances in theory often require putting aside everyday constraints like legislative political realities,[239] reformers might consider the dynamics of wealth defense when designing and pursuing new policies. This is not to say that all policies must be simple or easily comprehensible to nonspecialists. There are often good reasons for policies to be complex, but complexity has a cost in inheritance policy design.

For example, few have called to bring back the rule against perpetuities in its original, what-might-happen form. There are many proposed reforms, and some of them may share some of the Rule's complexities. Suggested solutions include limiting the duration of the federal exemption for generation-skipping transfer taxation;[240] fortifying the rule against perpetuities and limiting asset protection trusts;[241] instituting a federal tax on perpetuities;[242] passing a reinvigorated progressive estate tax with a modest, inflation-indexed exemption;[243] passing state taxes on trust incomes;[244] passing a progressive consumption tax;[245] passing state laws giving courts the power to modify or terminate perpetual trusts if doing so advantages current beneficiaries;[246] subjecting only the "first generation" of trust

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239 *See, e.g.*, Alstott, *supra* note 140, at 473–74 ("My goal here is simply to draw out the implications of equal opportunity for inheritance taxation. Although some of the innovations discussed here may be politically attractive, others are not . . . . [S]ome of the implications of equal opportunity—particularly the high taxation of bequests from relatives and the lower rates on older heirs—will probably strike the ordinary person (and the ordinary politician) as odd.").

240 *See* Sitkoff & Schanzenbach, *supra* note 88, at 362–63; Joel C. Dobris, *Undoing Repeal of the Rule Against Perpetuities: Federal and State Tools for Breaking Dynasty Trusts*, 27 CARDOZO L. REV. 2538, 2541 (2006); Daniel Hemel & Robert Lord, *Revitalizing the Generation-Skipping Transfer Tax* 20–22 (Univ. of Chi., Pub. L. & Legal Theory Working Paper No. 790, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3920038 [https://perma.cc/Y8NV-4ZBT].

241 *See* Chang, *supra* note 89, at 63.

242 *See* Kades, *supra* note 19, at 204.

243 Karen C. Burke & Grayson M.P. McCouch, *The Moving Target of Tax Reform*, 93 N.C. L. REV. 649, 671 (2015).

244 Lucy A. Marsh, *The Demise of Dynasty Trusts: Returning the Wealth to the Family*, 5 EST. PLAN. & CMTY. PROP. L.J. 23, 53 (2012).

245 Daniel J. Amato, *The Good, the Bad, and the Ugly: The Political Economy and Unintended Consequences of Perpetual Trusts*, 86 S. CAL. L. REV. 637, 676 (2013).

246 *See* Dukeminier & Krier, *supra* note 119, at 1340–41.

beneficiaries to the settlor's modification and termination rules;[247] and convincing the courts to recognize constitutional economic rights for ordinary families.[248]

For reformers, it may be worth considering whether such plans, if passed, are vulnerable over time to the same dynamics that undermined the rule against perpetuities. For example, the federal-tax-on-perpetuities idea aims to replace the "blunt" instrument of the rule against perpetuities with a tax on perpetuities "at a rate that reflects the external costs imposed on society."[249] By tailoring a tax in this fashion, the reform would be in line with economic principles and thus efficient, raising government revenue and improving private incentives.[250] In principle, it is an elegant solution to the perpetuities problem.

Matching the tax to the costs that perpetuities impose on society requires that one know what those costs are. One of the tax's supporters focuses on how perpetuities cause excessive savings, which harm nationwide economic growth.[251] Excessive savings might harm economic growth, but the judges who created the rule against perpetuities—or the scholars who later championed it—also had other costs in mind.[252] Dynastic, dead-hand-controlled wealth has costs beyond excessive savings; as discussed in Part II, it can lead to inefficiently planned wealth, on one hand, and the erosion of equal opportunity that dynasties entail, on the other. There are also the costs to democratic decision-making.[253] Even initially trying to calculate these costs with dollar values is likely to lead to debates about relative costs and the best way to count them, and positions in these debates will be significantly divergent. A rule chosen to set the dollar amount that perpetuities should be taxed could generate incentives for evasion in ways that, like the lawmakers that passed the generation-skipping transfer tax, Congress is unlikely to anticipate. And, should the perpetuities tax prove

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[247] Richard C. Ausness, *Sherlock Holmes and the Problem of the Dead Hand: The Modification and Termination of "Irrevocable" Trusts*, 28 QUINNIPIAC PROB. L.J. 237, 240 (2015).

[248] Tait, *supra* note 112, at 1036–37.

[249] *See* Kades, *supra* note 19, at 204.

[250] *Id.* at 204–05.

[251] *Id.*

[252] *See supra* notes 106–107 and accompanying text.

[253] *See* James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 840 (2001) ("[C]oncentrations of wealth have a harmful impact on the effectiveness of democracies to the extent that an objective of democracy is to give all participants an equal voice."); Timothy K. Kuhner, *The Corruption of Liberal and Social Democracies*, 84 FORDHAM L. REV. 2453, 2467 (2016); Richard E. Davis & Danielle J. Halachoff, *Back to the Past: A Return to the Gilded Age?*, 28 OHIO PROB. L.J. 7 (2018). Kades also recognizes this cost but does not appear to include it in the tax-to-cost calculation. Kades, *supra* note 19, at 202–03.

burdensome for wealthy fortunes, then the possibilities for repeal will grow as time passes and people forget the justification for the complex tax.

One might also consider the proposal to pass state laws giving courts the power to modify or terminate perpetual trusts if doing so helps current beneficiaries.[254] This proposal, as Dukeminier and Krier argued, concludes that the rule against perpetuities is "no longer worth [its] complexities."[255] Intended to provide simplicity, these laws would give courts the power to modify trusts after those income beneficiaries who were alive at the creation of the trust were dead, and so give a rough approximation of the balancing of interests that the rule against perpetuities had previously secured. At the same time, this approach has its own disadvantages. As Dukeminier and Krier note, terminating or modifying the trust under the new laws would require "a lawsuit, perhaps of uncertain outcome."[256] Indeed, new uncertainties might come into existence, depending on how such a statute was written. Additionally, if terminating a trust would subject the principal to federal taxes, then there would be, it seems, an automatic hurdle to trust beneficiaries who wanted to end the trust. These and similar arguments might be developed by the skilled advisers drawn upon by trustees and those interests that wanted to retain large fortunes as sources of revenue.

Finally, consider perhaps the most intuitive proposal—simply setting a federal limit on trust disbursements to track the policy of the old Rule.[257] The possibility for dynasty trusts to escape taxation into perpetuity only exists due to the fact that federal law that marks states' perpetuities requirements.[258] Commentators like Sitkoff and Schanzenbach have emphasized that one of Congress's goals in the 1986 tax reforms was "to prevent the 'enjoyment of property followed by its movement down the generations without being subjected to estate or gift tax.'"[259] On this account, Congress should have been surprised when states removed their Rules against Perpetuities in order to avoid Congress's goal, and Congress thus might have acted to amend federal law in order to counteract the evasion. But it has been almost forty years, and Congress has not made such an amendment. The complexity–information cost dynamic may at least partially explain its tacit acceptance.

The relative popularity of the Rule's policy goals among trusts and estates scholars of different persuasions suggests that there is support for this

254 *See* Dukeminier & Krier, *supra* note 119, at 1340–41.

255 *Id.* at 1340.

256 *Id.* at 1341.

257 *See* Sitkoff & Schanzenbach, *supra* note 88, at 362–63.

258 *Id.* at 363.

259 *Id.* (first citing JEFFREY N. PENNELL, WEALTH TRANSFER PLANNING AND DRAFTING ch. 18, at 27 (2005); and then citing H.R. REP. NO. 99-426, at 824–25 (1985)).

kind of regulation of dynastic wealth among academic commentators.[260] But turning that support into a durable policy remains a difficulty. Complexity's costs offer a point in favor of a fixed-term waiting period. Thus, some have argued to add a fixed term of ninety years to all trusts, akin to the Uniform Statutory Rule Against Perpetuities.[261] Fixed terms of years different from ninety have also been proposed.[262] The advantage to a law that ends trusts' vesting potential after a fixed term is that the rule would be much easier to learn for lawyers, and perhaps easier to explain to the interested public, than the original Rule.[263] Ninety years would already be an increase over what trusts and estates professors thought was wise in the 1950s,[264] but its popularity in the 1980s might signal the potential for wider support. But, because this version of the Rule already existed in 1986, and proved unable to deter many states from repealing the Rule wholesale, questions remain about how best to drive popular defense and support for it.

Inheritance reforms are often thought about in the present tense, asking what kinds of policies would most successfully achieve a particular goal in light of idealized theoretical commitments.[265] The wealth defense phenomenon indicates that long-term success requires thinking in the future tense. It asks that one consider not just what policies are most likely to achieve a particular goal now—and, by implication, what policies can muster enough support to become law now—but also what policies are going to be durable over time. In some respects, the rule against perpetuities was quite successful, lasting as a widely adopted common law rule for three

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260 *Cf.* Bernard E. Harcourt, *Fantasies and Illusions: On Liberty, Order, and Free Markets*, 33 CARDOZO L. REV. 2413, 2422 (2012) ("[A]ll markets, all forms and venues of economic exchange are man-made, constructed, regulated, and administered by often complex mechanisms that necessarily distribute wealth in large and small ways.").

261 *See* Frederick R. Schneider, *A Rule Against Perpetuities for the Twenty-First Century*, 41 REAL PROP., PROB. & TR. J. 743, 805–06 (2007).

262 *See* Haskell, *supra* note 223, at 549.

263 Reformers might also consider the power of narrative in inheritance law. *See* Deborah S. Gordon, *Mor[t]ality and Identity: Wills, Narratives, and Cherished Possessions*, 28 YALE J.L. & HUMAN. 265, 273–74 (2016). Successes in rolling back constraints on hereditary fortunes have been achieved by using narratives of family farms and businesses to persuade voters of the drawbacks of, for example, inheritance taxes, even when these farms and businesses are not in fact subject to the tax. *See* Batchelder, *supra* note 1, at 89. Clearly explaining the reasons to deter the formation of large aristocratic fortunes is necessary to develop support for such policies.

264 *See* Dukeminier, *supra* note 60, at 1030 (quoting 6 W. BARTON LEACH, AMERICAN LAW OF PROPERTY § 24.16, at 52 (A. Casner ed., 1952)).

265 *See, e.g.*, Alexander A. Boni-Saenz, *Distributive Justice and Donative Intent*, 65 UCLA L. REV. 324, 329 (2018) (developing a "distributive critique of probate formalism").

centuries—significantly longer than permanent federal inheritance taxes,[266] which remain subject to periodic pushes for elimination.[267] If the information-asymmetry theory of complexity in inheritance law is correct, then its lessons might also apply to tax—a famously complex field.[268]

CONCLUSION

Debates about the ethics and public policy of inheritance have existed since the United States was founded.[269] Perhaps they will never end. Because questions about morally optimal inheritance regimes will outlast our time, it might be appealing to think that debates in inheritance law are not pressing. But there are two ways in which our era differs from the previous century. Large wealth transfers have begun to pass from one generation to the next, while, at the same moment, an ancient common law Rule meant to curtail dynastic wealth has been overturned. This history offers lessons that go beyond trusts and estates doctrine, implicating issues of public law.

This Article has developed a theory based on the rule against perpetuities' history. It has argued that there is a particular cost to complexity in inheritance law. Complex sets of rules can allow for evasion; they can also, over time, render themselves vulnerable to elimination. Campaigns by coordinated special interests motivated to recognize the operation and consequences of complex rules face less defense from observers and the public when the underlying rules and their rationales are hard to understand. This is true even if—as with the rule against perpetuities—the underlying policy reasons for the rules' existence remain unchanged. In anticipating how the politics of wealth defense might play out in advanced decades,

[266] Ad hoc inheritance taxes were first levied to fund foreign policy in the aftermath of the Revolutionary War and were periodically used to fund wartime government programs thereafter. They were instituted on a permanent basis in the early twentieth century. *See* Eisenstein, *supra* note 209, at 225–38.

[267] *See* Kades, *supra* note 19, at 182–83.

[268] *See, e.g.*, Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 548 (1995) (describing the earned income tax credit as "complex"); J.B. Ruhl & Daniel Martin Katz, *Measuring, Monitoring, and Managing Legal Complexity*, 101 IOWA L. REV. 191, 193 (2015) ("[M]ost Americans believe the Tax Code is too complex. Many legal scholars believe the Tax Code is too complex. Even the Internal Revenue Service's own National Taxpayer Advocate Service believes the Tax Code is too complex."); James W. Colliton, *Standards, Rules and the Decline of the Courts in the Law of Taxation*, 99 DICK. L. REV. 265, 265 (1995) ("The tax law is the most complex body of statutory law that exists in our legal system.").

[269] *See* Eisenstein, *supra* note 209, at 258–59 (citing support from, among others, Thomas Jefferson, John Stuart Mill, and Theodore Roosevelt for the concept of limiting inherited wealth). Indeed, they have existed for far longer than that. *See, e.g.*, Thomas Frank, *Exploring the Boundaries of Law in the Middle Ages: Franciscan Debates on Poverty, Property, and Inheritance*, 20 LAW & LITERATURE 243, 243–45 (2008) (discussing Franciscan views of testamentary bequests in the thirteenth century).

ideas for inheritance law reform should consider the future as well as the present tense.